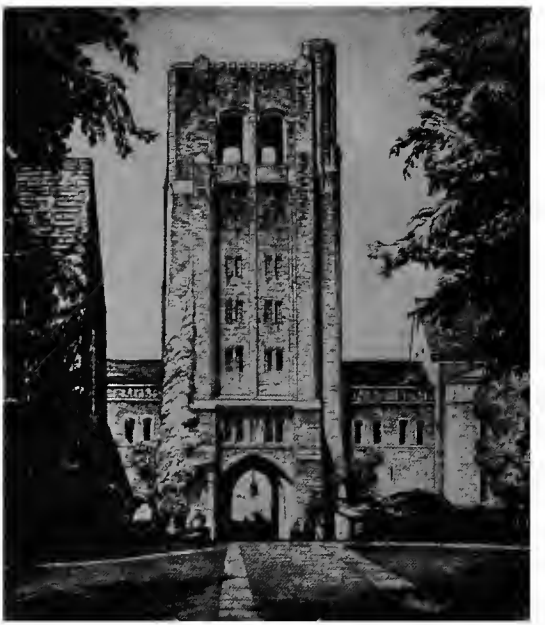
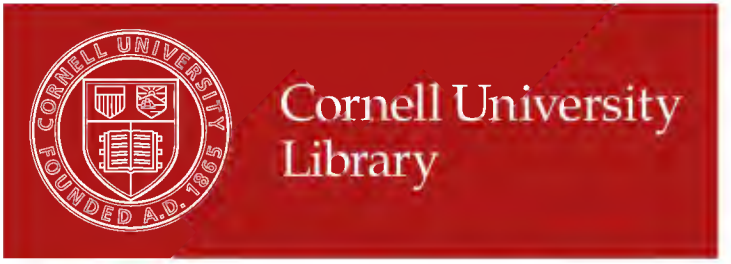
PRINCIPLES OF CONTRACT

PENJAMIN





THE

GENERAL PRINCIPLES

OF THE

LAW OF CONTRACT

IN

THE FORM OF RULES

FOR THE

USE OF STUDENTS

BY

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PREFACE.

THIS work is an attempt to state methodically the general principles relating to the Formation, Interpretation, and Discharge of Contract. The statements are in the form of rules, followed by such comments, reasons, and illustrations as seemed suitable to bring out clearly before the mind of the student the import of each proposition.

While the work is primarily designed for the use of students, I trust that the practicing lawyer will find it to be a serviceable compilation (in the nature of a Code) of the principal rules of the law of contract.

In the preparation of these rules I have constantly consulted the proposed New York Civil Code, the Indian Contract Act, and the able treatises of Leake, Pollock, and Anson. My aim has been to embody the fundamental principles of contract in language, clear, concise, and accurate; and in the endeavor to accomplish this purpose I have freely availed myself of the labors of others. But each proposition is supported by the authority of adjudged cases, taken for the most part from the more accessible of the American Reports, and selected with a view to force of reasoning and pertinency of illustration.

I believe that the principles of contract can, and at some future day will be satisfactorily codified. May I not express the hope that this elementary work will contribute in some degree toward hastening that day?

BLOOMINGTON, ILL., July, 1889. R. M. B.

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INTRODUCTION.

A law is a governing rule of action.

In a metaphorical sense the term is used to denote the order or invariable sequence of natural phenomena, as the law of gravitation.

In its proper sense it is a precept for the control of human action, and implies not only the power of volition on the part of the governed, but also a liability to punishment or detriment in the case of disobedience. Such punishment or detriment is called the sanction of a law.

Laws rest for their support upon one or more of three classes of sanctions:

(1) Sanctions of conscience, *i. e.*, the divine displeasure, or the stings of conscience.

(2) Sanctions of popular sentiment, *i. e.*, the censure or dislike of the community.

(3) Sanctions of public authority, *i. e.*, the penalties or inconveniences authorized by the state or nation.

The greater portion of the laws of morality and of social demeanor are dependent for their efficiency

upon the first and second of these classes of sanctions. Some laws, such as the law against murder, are sustained by all three of them, while other laws, such as those for the collection of a revenue, may not involve questions of conscience, and often are opposed to the popular sentiment. All laws, whether of divine or of human origin, which are enforceable by public authority, are called positive laws.

Positive law, in a collective sense, is the totality of the rules of action which are enforceable by public authority.

Positive law may be (1) international, or (2) national or state.

The element of compulsion to obedience through the public force distinguishes the positive law from all others enumerated by jurists or moralists. International law, therefore, may be considered as positive law, inasmuch as its ultimate support is an appeal to arms. And although the appeal to arms may not be resorted to in every case, yet the fear of incurring general hostility operates upon nations, keeping them within the rules of national comity.

International law is either (1) public or (2) private.

Public international law defines and adjusts the mutual rights and duties of the governments of different nations or states.

Private international law defines and adjusts the mutual rights and duties of individual citizens in different nations or states.

The people of the United States, in the Constitution ordained and established by them, have declared what shall be the supreme law of the Nation, as follows:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." Art. 6, § 1 (2).

Subordinate to this supreme law of the Nation, the law of a State in our Union, is the will of the people of the State as to what shall be enforceable by public authority as governing rules of action.

The will of the people of a State is manifested:

(1) By the constitution, which is the organic act of the people establishing the form and powers of the government.

(2) By statutes and municipal ordinances, which are the enactments of their legislative bodies declaring what shall be obeyed and applied as governing rules of action.

(3) By the common or customary law, which is an unwritten law comprising those principles and maxims which, by reason of a common conviction as to the necessity or convenience of their observance, the people have spontaneously recognized and adopted as governing rules of action, by a constant and uniform application in the relations of life.

> What is frequently called judge-made law, as it displays itself in judicial decisions, is only an evolution of customary law, for the judiciary in making their decisions are guided by those principles and maxims of reason and justice which have been previously established by their customary observance in the infinitely varying circumstances of life.

The common law is subordinate to the statutes, and both are subordinate to the constitution.

Where it is not forbidden by or opposed to the policy of any law of the state or nation; individuals may, by mutual contract, prescribe for themselves a rule of action relative to a certain object, which the public authorities will recognize as obligatory upon the parties.

In a free country laws may be regarded as contracts express or implied. Thus the constitution may be regarded as the express contract of the people, made by them directly; statutes as the express contracts of the people made through their representatives, the legislature; and the common law as consisting of the implied contracts of the people, arising from the customs of the land and from the presumption that the people upon entering into the civil compact undertake to do what reason and justice dictate. "Implied contracts," says Blackstone, "are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform." As the laws themselves may be regarded as contracts, so contracts may be regarded as *quasi* laws binding upon the parties thereto. In other words, a contract is, in a certain sense, the law made by the parties relative to a certain object, and as such enforceable by the public authorities.

The law of a state, as to its nature, is either (1) absolute or imperative, or (2) complementary or regulatory.

By absolute or imperative law are meant the rules, which, founded upon public order,—the pecuniary or administrative interests of the state,—or good morals,—leave no room for the exercise of individual will. They are enforced, whether individuals desire it or not.

Complementary or regulatory law leaves an ample field for exercise of individual will, and

operates only when the parties interested have neglected to determine their respective legal rights to their full extent.

The law of a state, as to its subject matter, may be conveniently divided into (1) political law, (2) criminal law, and (3) civil law.

Political law relates to the constitution and administration of the state.

Criminal law relates to offences which are directly prosecuted and punished by the state.

Civil law, as distinguished from political and criminal law, relates to the mutual legal rights and duties of individuals, and to legal remedies other than criminal prosecutions for their violation.

> Political law and criminal law are both of a well defined public nature. Although all state laws are public in a general sense, inasmuch as the good of the public is or ought to be their end, yet civil law, in a restricted sense, is of a private nature, because it defines and adjusts the rights and duties of individuals as between themselves.

A right, in its legal acceptation, is a power, capacity, or liberty given or allowed by the law to a person in relation to some person, thing, act, or forbearance.

The object of a right may be a person or a thing. A minor child is the object of the parent's right to its custody and control. A watch or land is the object of the owner's right to its undisturbed enjoyment.

In many classes of cases there is no object (*i. e.*, person or thing) over which the right can be said to exist. The right may be merely (1) a right to an act, as where one has hired another to do something, or (2) a right to forbearance, as in the case of a patent-right or monopoly.

Rights considered with reference to their scope or compass are either (1) rights *in rem*, or (2) rights *in personam*.

A right *in rem* is one which avails against persons generally.

As the right of the owner over his land; or the right of a man to his good name or reputation. Such a right avails against everybody.

A right *in personam* is one which avails against a person or persons certain or determinate.

As the right of the purchaser against the vendor of land where the former has only a contract for its conveyance; or the right of the buyer against the seller of a business where one of the terms of the sale is that the seller shall not compete with the buyer within a reasonable extent of territory.

Rights considered with reference to their origin are either (1) primary, or (2) secondary.

Primary rights are those which do not originate in the violation of pre-existing rights. They include (1) all rights that are directly given or allowed by the law, and (2) all rights that arise from contracts.

The two classes of primary rights may be distinguished as (1) rights *ex lege*, and (2) rights *ex contractu*. The right of the parent to the services of his minor child is a right *ex lege*. The right of the employer to the services of his employee is a right *ex contractu*.

Secondary rights are remedial or sanctioning rights. They arise from civil injuries.

A civil injury is a violation of a pre-existing right for which the law gives a right of private action.

The term civil injury includes a breach of contract as well as a *delictum* or tort.

The foregoing statements have been made by way of introduction for the purpose of showing the place and importance of the Law of Contract. Rights arising from contracts stand by the side of rights directly given or allowed by law. The right to the custody and control of a minor may arise from a

contract, as in the case of master and apprentice, or it may be directly recognized by the law, as in the case of parent and child. The right of ownership may result from a contract as well as from the direct operation of the Statutes of Descent or of Wills. And the right of one person to an act or forbearance on the part of another is generally derived from their mutual contract—the special law of the parties—although there are some acts and some forbearances commanded by the general law of the land, such as acts and forbearances respectively enforceable by the writs of mandamus and injunction. It would, therefore, seem that a knowledge of the General Principles of the Law of Contract is an essential prerequisite to a proper investigation of the great body of rights pertaining to either persons, things, acts, or forbearances. These general principles will now be considered under the heads of the Formation, the Interpretation, and the Discharge of Contract.

THE FORMATION OF CONTRACT.

An agreement is the union of two or more persons in a common expression of will as to their legal relations.

A contract, in the widest sense of the term, is an agreement whereby at least one of the parties acquires a right in relation to some person, thing, act, or forbearance.

This may be either

1. A right *in rem*—against all persons indefinitely—as the proprietary right acquired by a deed of conveyance; or,

2. A right *in personam*—against a definite person—as the right acquired by a bond for a conveyance.

A contract, in a narrower sense, is an agreement whereby at least one of the parties acquires the right to an act or forbearance on the part of the other. The obligation assumed by the other is called a promise.

A contract, in this sense, does not include any agreement whose sole purpose is to confer a present

right *in rem*. It always confers some right *in personam*, and the corresponding duty is an obligation to do or not to do a particular thing. It is always executory in its character, and hence is frequently called an executory contract.

The elements essential to the validity and enforcement of a contract are:

1. A communication whereby the parties unite in a common expression of will as to their legal relations; in other words, Offer and Acceptance.

2. A Consideration.

3. A Writing, wherever it is required by the Statute of Frauds.

4. Capacity of the parties to make a contract.

5. Reality of the consent expressed in offer and acceptance.

6. Legality of the object of the contract.

CHAPTER I.

OFFER AND ACCEPTANCE.

The following rules govern offer and acceptance considered as elements of a contract:

The offer must manifest an intention to create or change legal relations.

An offer evidently made in jest, though accepted, is not binding, for in such case the parties do not contemplate any legal consequences.

McClurg v. Terry, 21 N. J. Eq. 225.
Keller v. Holderman, 11 Mich. 248.

An appointment between two friends to take a walk or dine together is not binding, for it is not meant to produce any new legal duty or right, or any change in existing ones.

Acceptance must be absolute, and identical with the terms of the offer.

To constitute a contract the acceptance of the offer must be unconditional.

Eggleston v. Wagner, 46 Mich. 610, 620.
Hussey v. Horne-Payne, 8 Ch. D. 670.
Corcoran v. White, 117 Ill. 118.

Harlow v. Curtis, 121 Mass. 320.
Hough v. Brown, 19 N. Y. 111.

An acceptance is insufficient where any term of the proposed contract, as, for instance, the time allowed for a deferred payment (a), or for the assertion of an option (b), is left for future consideration and adjustment.

(a) Potts v. Whitehead, 23 N. J. Eq. 512.

(b) Brown v. R. R. Co., 44 N. Y. 79.

An acceptance, to be good, must be such as to conclude a contract between the parties; and to do this it must, in every respect, meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand.

Potts v. Whitehead, 23 N. J. Eq. 512.

An acceptance upon terms varying from those proposed is in effect a counter proposal, and is not binding until it is itself accepted.

Slaymaker v. Irwin, 4 Whart. 369, 380.
Esmay v. Groton, 18 Ill. 483.
Maclay v. Harvey, 90 Ill. 525.

Such counter proposal is also a virtual rejection of the original proposal (a), and since a proposal when rejected is at an end, a subsequent acceptance of the original proposal can only operate as a new counter proposal, which the original proposer may either accept or reject (b).

(a) Nat. Bank v. Hall, 101 U. S. 43, 50.
Smith v. Wetherell, 4 Ill. App. 655.

(b) Fox v. Turner, 1 Ill. App. 153, 159.
Minneapolis &c. Ry. Co. v. Mill Co., 119 U. S. 149.

An offer may be revoked at any time before acceptance.

This may be done even if the offer purports to give a definite time for acceptance.

Minneapolis, &c. Ry. Co. v. Mill Co., 119 U. S. 149, 151.
Dickinson v. Dodds, 2 Ch. D. 463.
Boston, &c. R. R. Co. v. Bartlett, 3 Cush. 224.
Larmon v. Jordan, 56 Ill. p. 206.
School Directors v. Trefethren, 10 Ill. App. 127.
Schenectady Stove Co. v. Holbrook, 101 N. Y. p. 49.

So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party.

An offer may lapse before acceptance:

(1) By expiration of a prescribed time for acceptance.[1]

(2) Where no time is prescribed, by the expiration of a reasonable time for acceptance.[2]

(3) By failure to comply with a condition in the offer as to the mode of acceptance.[3]

(4) By the death[4] or insanity[5] of either party.

1. A limitation of time for which an offer is to run is equivalent to the withdrawal of the offer at the end of the time named.

Longworth v. Mitchell, 26 Ohio St. 334, 342.
Potts v. Whitehead, 20 N. J. Eq. 55, 59.

Where a person makes an offer by mail requesting, or by the nature of the business having the right to expect an answer by return mail, the offer can

only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return mail, or at least within twenty-four hours from the time the offer is received.

Maclay v. Harvey, 90 Ill. 525, 529.
Carr v. Duval, 14 Pet. 82.
Palmer v. Ins. Co., 84 N. Y. 63.
Ortman v. Weaver, 11 Fed. Rep. 362.

2. Loring v. Boston, 7 Met. 409.
Chicago, &c. R. R. Co. v. Dane, 43 N. Y. 240.

What is a reasonable time must depend upon the subject matter and circumstances of the negotiation.

Larmon v. Jordan, 56 Ill. 204.
Minnesota Oil Co. v. Lead Co., 4 Dillon, 431.

3. A condition as to the place of acceptance is held to be an essential part of the offer.

Eliason v. Henshaw, 4 Wheat. 225.

4. Pratt v. Trustees, 93 Ill. 475.
Helfenstein's Est., 77 Pa. St. 328.
Wallace v. Townsend, 43 Ohio St. 537.

The continuance of an offer is in the nature of its constant repetition, which necessarily requires some one capable of making a repetition.

Pratt v. Trustees, 93 Ill. 478.

And since an offer unaccepted can create no rights it can transmit none to the representatives of the person to whom the offer is made.

Sutherland v. Parkins, 75 Ill. 338, 341.

5. Beach v. M. E. Church, 96 Ill. 177.

Where the parties communicate by means wholly or partly beyond their control, such as

the mail[1] or telegraph,[2] the contract is complete the moment the acceptance is despatched, provided this is done in due time after receipt of the offer and before notice of any withdrawal is received.

1. Where the negotiation is by letters sent by mail, the party to whom the offer is made has a right to regard it as a continuing offer until it has reached him and he has had a reasonable time in which to accept or reject it, and if within such time, and without notice of a withdrawal of the offer, he accepts it the contract is complete the moment the letter of acceptance is mailed (a), although in the meantime the offerer has mailed another letter withdrawing the offer (b), and even though the letter of acceptance is never received by him (c).

(a) Adams v. Lindsell, 1 B. & Ald. 681.
Tayloe v. Ins. Co., 9 How. 390.
Dunlop v. Higgins, 1 H. L. C. 381.

(b) Byrne v. Van Tienhoven, 5 C. P. D. 344.
Stevenson v. McLean, 5 Q. B. D. 346.
Wheat v. Cross, 31 Md. 99.

(c) Household Ins. Co. v. Grant, 4 Ex. D. 216.
Vassar v. Camp, 11 N. Y. 441.
Howard v. Daly, 61 N. Y. 362.
Washburn v. Fletcher, 42 Wis. 152.
Haas v. Myers, 111 Ill. p. 426.

The contract is held to be complete when the acceptor has mailed the letter of acceptance, because this is an act contemplated and impliedly authorized by the offerer as the mode of manifesting the intention of the accepter to close with the offer. The accepter by this act does all that is requisite in the

usual course of business—he thereby puts the letter of acceptance beyond his control, and he is not answerable for the casualties of the mail service.

But the offerer may always, if he chooses, make the formation of the contract dependent upon the actual communication to himself of the acceptance.

Lewis v. Browning, 130 Mass. 173, 175.
Haas v. Myers, 111 Ill. 421, 427.

2. Minnesota Oil Co. v. Lead Co., 4 Dillon 431.
Trevor v. Wood, 36 N. Y. 307.
Perry v. Iron Co., 15 R. I. 380.

An agreement is not a contract unless its terms are certain or capable of being made certain.

An offer, though accepted in terms, may be too vague to be legally enforced.

Thus, where an intestate promised his niece that if she would live with him until her marriage he would give her "one hundred acres of land," without anything to indicate its location or value, it was held that the promise was void for uncertainty.

Sherman v. Kitsmiller, 17 S. & R. 45, 48.

So where the defendant promised the plaintiffs that if they would buy a certain store-house and stock of goods, he would "assist them by indorsing their paper and advancing them the money to carry on the mercantile business advantageously," it was held that the promise was too indefinite and uncertain to support an action.

Erwin v. Erwin, 25 Ala. 236, 242.

The offer or acceptance may be expressed by conduct as well as by words.

A person who takes a seat at the dining table of a hotel thereby requests a meal for the usual price, and the proprietor accepts the proposal by furnishing the meal.

So, if A, with B's knowledge and silent acquiesence, does work beneficial to B under such circumstances that no reasonable man would suppose that A meant to do the work for nothing, B will be liable for the value of the work.

DeWolf v. Chicago, 26 Ill. 443.
Huck v. Flentye, 80 Ill. 262.
Day v. Caton, 119 Mass. 513.

The doing the work with B's knowledge is the proposal, and B's acquiesence is the acceptance.

Performance of the conditions of an offer,[1] or the acceptance of the consideration proffered therewith,[2] is an acceptance of the offer.

1. Perkins v. Hadsell, 50 Ill. 216.
Kinder v. Brink, 82 Ill. 376.
Goward v. Waters, 98 Mass. 598.
Miller v. McKenzie, 95 N. Y. 579.

2. Miller v. McManis, 57 Ill. 126.
Pickrel v. Rose, 87 Ill. 263.

If A tells B that he will pay him a certain sum of money for a day's work, B may accept by doing the work or by taking the money.

An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person.

The offer by way of advertisement of a reward for information leading to the restoration of property or the conviction of a criminal, addressed to the public at large, becomes obligatory, if not previously revoked, as soon as an individual, with a view to the reward, renders the specified service, but not before. This is the ordinary case of work done on request.

Wentworth v. Day, 3 Met. 352, 354.
First Nat. Bank v. Hart, 55 Ill. 62.
County v. Robinson, 85 Ill. 174.
Pierson v. Morch, 82 N. Y. 503.

Until the service is rendered, the offer of the reward is a mere proposal and may be revoked by an advertisement of equal publicity, even as against a person who acts on the proposal not knowing it has been revoked.

Shuey v. United States, 92 U. S. 73.

To entitle one to the reward, he must have had notice of the offer at the time he rendered the service; for no one can assent to that which he has not heard of.

Fitch v. Snedaker, 38 N. Y. 248.
Howland v. Lounds, 51 N. Y. 604.
See, also, Ball v. Newton, 7 Cush. 599.

CHAPTER II.

CONSIDERATION.

In every contract containing a promise there must be a consideration for the promise.[1]

Qualification.—If such contract is under seal,[2] or negotiable,[3] the form imports a consideration.[4] But the want of a consideration may be pleaded and proved,[5] except against the *bona fide* assignee[6] of a negotiable contract assigned to him before it became due.[7]

1. Burnet v. Bisco, 4 Johns, 235.
Fowler v. Shearer, 7 Mass. 14.
McLean v. McBean, 74 Ill., 134.
Greenman v. Greenman, 107 Ill. 4.
Williams v. Forbes, 114 Ill. 167.

2. A seal is an impression on wax, or other tenacious substance, capable of being impressed.

In Illinois, and several of the states, it is provided by statute that any instrument of writing, to which the maker shall affix a scrawl by way of seal, shall be of the same effect and obligation, to all intents, as if the same were sealed.

R. S., Ch. 29, § 1.

A contract under seal is frequently called a specialty or deed. A contract not under seal, whether written or oral, is called a simple or parol contract.

3. A contract is said to be negotiable if it can be so transferred that the assignee has the right to sue upon it at law in his own name, as a bill of exchange or promissory note.

4. Wing v. Chase, 35 Me. 260, 265.
Buckmaster v. Grundy, 1 Scam. 310.
Evans v. Edwards, 26 Ill. 279.
Mitchell v. Sheldon, 2 Blackf. 185.
Stacker v. Hewitt, 1 Scam. 207.
Bilderback v. Burlingame, 27 Ill. 338.
Townsend v. Derby, 3 Met. 363.

5. R. S., Ch. 98, § 9.
Gage v. Lewis, 68 Ill. p. 613.
Case v. Boughton, 11 Wend. 106.
Schoonmaker v. Roosa, 17 Johns. 301.
Kirkpatrick v. Taylor, 43 Ill. 207.

6. A *bona-fide* assignee is an assignee for value, and without notice of the want of a consideration.

7. R. S. Ch. 98, § 9.
Murray v. Lardner, 2 Wal. 110.

When, at the desire of the promisor,[1] the promisee, or any other person on his behalf,[2] confers or promises to confer[3] any benefit upon the promisor,[4] or incurs or promises to incur any detriment,[5] and such benefit, detriment, or promise is the inducement of the promisor's promise,[6] it is a sufficient consideration for the promise.

1. The desire or, in the language of pleading, "request" may be express or implied.

2. The prevailing rule in this country is that if one person, for a valid consideration, makes a parol promise to another for the benefit of a third person, the third person may maintain an action on the promise.

Bristow v. Lane, 21 Ill. 194, 197.
Lawrence v. Fox, 20 N. Y. 268.
Hendrick v. Lindsay, 93 U. S. 143.

3. A promise is a sufficient consideration for a promise.

Funk v. Hough, 29 Ill. 145.
Cooke v. Murphy, 70 Ill. 96.
Thayer v. Allison, 109 Ill. 180.
Philpot v. Gruninger, 14 Wal. 570.
Coleman v. Eyre, 45 N. Y. 38.

4 Doyle v. Knapp, 3 Scam. 334.
Parker v. Crane, 6 Wend. 647.
Buchanan v. International Bank, 78 Ill. 500.

Marriage is a valuable consideration.

Rockafellow v. Newcomb, 57 Ill. 191.
Magniac v. Thompson, 7 Pet. 393.
Wright v. Wright, 54 N. Y. 440.
Peck v. Vandemark, 99 N. Y. 35.
Frank's Appeal, 59 Pa. St. 194.

5. Forster v. Fuller, 6 Mass. 58.
White v. Walker, 31 Ill. 422.
Burch v. Hubbard, 48 Ill. 171.
Townsley v. Sumrall, 2 Pet. 182.
White v. Baxter, 71 N. Y. 261.

6. The mere fact that somebody has conferred a benefit or incurred a detriment at the promisor's

request cannot have any effect on his promise to some one else, unless this fact is in some way connected with the promise and shown to have had something to do in producing it.

The consideration need not be adequate to the promise, but it must be of some value.

A slight consideration is sufficient to support a promise.

Heckenkemper v. Dingwehrs, 32 Ill. 538, 540.
Hubbard v. Coolidge, 1 Met. 93.
Worth v. Case, 42 N. Y. 369.

So long as the promisor gets what he has bargained for, and there is no claim of fraud or undue influence, the court will not inquire into the adequacy of the consideration.

McArtree v. Engart, 13 Ill. 242, 248.
Lawrence v. McCalmont, 2 How. 426, 452.
Eyre v. Potter, 15 How. 42, 59.
Earl v. Peck, 64 N. Y. 596

The abandonment of any legal or equitable right against the promisor or a third party,[1] or the forbearance to exercise it for a definite or reasonable time,[2] is a sufficient consideration for a promise.

So is the compromise of a disputed claim, honestly made, although it ultimately prove to be unfounded.[3]

1. Leverenz v. Haines, 32 Ill. 357.
Smith v. Weed, 20 Wend. 184.
St. Clair v. Perrine, 75 Ill. 366.

2. Oldershaw v. King, 2 H. & N. 517.
Crears v. Hunter, 19 Q. B. D. 341.
Calkins v. Chandler, 36 Mich. 320.
Boyd v. Freize, 5 Gray 553.
Underwood v. Hossack, 38 Ill. 208.
Worcester Nat. Bank v. Cheeney, 87 Ill. 602.

3. McKinley v. Watkins, 13 Ill. 140, 144.
Honeyman v. Jarvis, 79 Ill. 318, 322.
Parker v. Enslow, 102 Ill. 272, 278.
Barlow v. Ins. Co., 4 Met. 270, 276.
Kerr v. Lucas, 1 Allen, 279, 280.
Feeter v. Weber, 78 N. Y. 334, 337.
Union Bank v. Geary, 5 Pet. 99, 114.
Northern &c. Co. v. Kelly, 113 U. S. 199, 202.
Miles v. New Zealand &c. Co., 32 Ch. D. 266.

The claim must be made in good faith with a color of right. It is not sufficient if made without any reasonable ground for believing that it might be sustained.

Gates v. Shutts, 7. Mich. 127, 133.
White v. Hoyt, 73 N. Y. 505, 515.
Mulholland v. Bartlett, 74 Ill. 58, 62.
Ormsbee v. Howe, 54 Vt. 182, 186.
Bellows v. Sowles, 55 Vt. 391, 398.
Headley v. Hackley, 50 Mich. 43, 45.
Ware v. Morgan, 67 Ala. 461, 469.

The delivery of property to a person in trust is a sufficient consideration for a promise to execute the trust.

Hart v. Miles, 4 C. B. (N. S.) 371.
Rutgers v. Lucet, 2 Johns. Cas. 92.
Jenkins v. Bacon, 111 Mass. 373.

If the promisor had not made the promise the promisee would have had the property to deliver to somebody else who would have executed the trust.

Blood or natural affection is not sufficient to support a promise.[1]

Nor is a mere moral obligation.[2]

1. Natural affection constitutes a sufficient consideration for a conveyance, but not for an executory contract.

Fink v. Cox, 18 Johns. 145.
Kennedy v. Ware, 1 Pa. St. 445.
Kirkpatrick v. Taylor, 43 Ill. 207.
Williams v. Forbes, 114 Ill. 167.
Phillips v. Frye, 14 Allen, 36.
Whitaker v. Whitaker, 52 N. Y. 368.

2. Dodge v. Adams, 19 Pick. 429.
Ehle v. Judson, 24 Wend. 97.

As, where a father promised to pay the expenses previously incurred in relieving his adult son, suddenly taken sick among strangers.

Mills v. Wyman, 3 Pick, 207.

Or, where a son promised to pay for necessaries previously furnished to his indigent father.

Cook v. Bradley, 7 Conn. 57.

The alleged consideration is insufficient where it is a promise whose performance is impossible in itself,[1] or impossible by law.[2]

1. Performance is deemed to be impossible in itself when it is impossible "according to the state of knowledge of the day."

See Clifford v. Watts, L. R. 5 C. P. p. 588

As in the case of a promise to go from London to Rome in three hours.

The Harriman, 9 Wal. p. 172.

2. A promise by A (without authority from B) to discharge a debt due to B, is a promise whose performance is impossible by law, for no one without the requisite authority can release a debt due to another.

Harvey v. Gibbons, 2 Lev. 161.

A promise to do, or actually doing what one is legally bound to do, is not sufficient to support a promise.

Hennessey v. Hill, 52 Ill. 281.
Voorhees v. Reed, 17 Ill. App. 21, 24.
Stuber v. Schack, 83 Ill. 191.
Crossman v. Wohlleben, 90 Ill. 537.

And, therefore, mere (a) part payment of a liquidated (b) claim already due (c) will not support a promise to relinquish the residue of the claim (d), or to forbear to sue for it (e).

(a) Neal v. Handley, 116 Ill. 418, 423.
Hastings v. Lovejoy, 140 Mass. 261, 266.
Keeler v. Salisbury, 33 N. Y. 648, 653.

(b) Rosenmueller v. Lampe, 89 Ill. 212, 215.
Ins. Co. v. Detwiler, 23 Ill. App. 656.

(c) Brooks v. White, 2 Met. 283, 286.
Harriman v. Harriman, 12 Gray, 341.

(d) Curtiss v. Martin, 20 Ill. 557, 577.
Hayes v. Ins. Co., 125 Ill. 626, 638.
Lathrop v. Page, 129 Mass. 19.

(e) Stuber v. Schack, 83 Ill. 191, 192.
Jennings v. Chase, 10 Allen, 526.

But in a composition by an insolvent debtor with his creditors there is a sufficient consideration for each creditor giving up a part of his claim, viz., the giving up proportional parts of their claims by the other creditors, whereby a fair division of the debtor's estate is secured.

Slater v. Jones, L. R. 8 Ex. 186, 193.
Farrington v. Hodgdon, 119 Mass. 453, 457.
White v. Kuntz, 107 N. Y. 518, 524.

A contract executory on both sides may be rescinded by mutual consent (a), and it seems that if this be virtually done the parties may thereupon make a new contract which will be binding, although the terms on one side may be the same as in the old contract (b).

(a) King v. Gillett, 7 M. & W. 55.

(b) Munroe v. Perkins, 9 Pick. 298, 305.
Lattimore v. Harsen, 14 Johns. 330.
Bishop v. Busse, 69 Ill. 403.
Cooke v. Murphy, 70 Ill. 96.
Stewart v. Keteltas, 36 N. Y. 388.
Rollins v. Marsh, 128 Mass. 116.

If any part of a single consideration for one or more promises is illegal the agreement is void.[1]

If any one or any part of any one of several considerations for a single promise is illegal the promise cannot be enforced.[2]

But if two distinct promises, one legal and the other illegal, are made for a valid consideration, the legal promise can be enforced.[3]

1. Henderson v. Palmer, 71 Ill. 579, 583.
Tobey v. Robinson, 99 Ill. 222.
Ricketts v. Harvey, 106 Ind. 564.
Bishop v. Palmer, 146 Mass. 469.

For public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal.

2. Filson's Trustees v. Himes, 5 Pa. St. 452.
Widoe v. Webb, 20 Ohio St. 431.
Perkins v. Cummings, 2 Gray, 258.
Trist v. Child, 21 Wal, 441.

3. Erie Ry. Co. v. Union &c. Co., 35 N. J. L. 240.
Ohio v. Board of Education, 35 Ohio St. 527.
United States v. Bradley, 10 Pet. 360.
Gelpcke v. Dubuque, 1 Wal. 222.
United States v. Hodson, 10 Wal. 408.
United States v. Mora, 97 U. S. 422.

So in the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch can be enforced.

Hanauer v. Gray, 25 Ark. 350.

And in the case of several promises based on several considerations, some of which are illegal, the promises made upon legal considerations can be enforced, if the contract is divisible.

Robinson v. Green, 3 Met. 159, 161.
Carleton v. Woods, 28 N. H. 290.

A past consideration will not support a subsequent promise.

Eastwood v. Kenyon, 11 A. & E. 438, 446
Bartholomew v. Jackson, 20 Johns. 28.
Allen v. Bryson, 67 Iowa, 591.
Carson v. Clark, 1 Scam. 113.
Chamberlin v. Whitford, 102 Mass. p. 450.

For a promise made on account of a past matter only is purely gratuitous.

An alleged exception to the rule is the claim that a past consideration will support a subsequent promise, if the consideration was given at the request of the promisor. This claim is too broad. For services are often rendered on request where the circumstances negative any intention or expectation of reward.

The following is believed to embody the full extent of the principle involved in the supposed exception when properly limited:

Explanation 1.—If a consideration is preceded by a request, and the request, under the circumstances, reasonably implies a promise of recompense, such promise can be enforced.

Davidson v. Gas Light Co., 99 N. Y. p. 566.
Milliken v. Telegraph Co., 110 N. Y. 403, 411.

Here are all the elements of a contract without the aid of a subsequent promise, and should there be a subsequent express promise to pay a definite sum it will only be regarded as evidence to be considered in determining what would be due recompense.

See Kennedy v. Broun, 13 C. B. (N. S.) p. 740.

A second alleged exception to the rule is the claim that where one has voluntarily done that which another was legally bound to do, it is a sufficient consideration to support a subsequent promise.

But the cases relied on as authority for this claim appear to rest on the principle that the subsequent ratification of an act done by a voluntary agent of another, without authority from him, is equivalent to a previous authority.

The true doctrine of these cases may be stated as follows:

Explanation 2.—If one without authority voluntarily does, on behalf of another, that which the other was legally bound to do, the latter may ratify the act by a subsequent promise of recompense, and the ratification will be equivalent to a previous request importing such promise.

Gleason v. Dyke, 22 Pick. 390, 393.
Doty v. Wilson, 14 Johns. 378, 382.
Hassinger v. Solms, 5 S. & R. 4, 8.
Paynter v. Williams, 1 Cromp. & Mees. 819.

A third alleged exception to the rule is to be found in the following well established principle:

Explanation 3.—Where a promise for a valuable consideration cannot be enforced against the will of the promisor, by reason of some rule or provision of law meant for his advantage, he may, subsequently, if of full capacity

to contract, renounce the benefit of such rule or provision by renewing his original promise.

Earle v. Oliver, 2 Exch. 90.

A promise by a person of full age to pay a debt contracted during his minority is an illustration of the principle.

Reed v. Batchelder, 1 Met. 559.

So is a promise to pay a debt barred by the statute of limitation (a), or after a discharge in bankruptcy (b).

(a) Keener v. Crull, 19 Ill. 189.
Carroll v. Forsyth, 69 Ill. 127.
Little v. Blunt, 9 Pick. 488.
Weston v. Hodgkins, 136 Mass. 326.

(b) St. John v. Stephenson, 90 Ill. 82.
Katz v. Moessinger, 110 Ill. 372.
Allen v. Ferguson, 18 Wal. 1.

In these cases the action is brought on the original promise, and the new promise simply operates as a *waiver* by the promisor of a defense with which the law has furnished him against an action on the old promise.

Way v. Sperry, 6 Cush. 238, 241.
Shippey v. Henderson, 14 Johns. 178, 180.
Betton v. Cutts, 11 N. H. 170, 179.
Norton v. Colby, 52 Ill. 198, 204.
Marshall v. Tracy, 74 Ill. 379.
Yaw v. Kerr, 47 Pa. St. 333.
Shepard v. Rhodes, 7 R. I. 470.

CHAPTER III.

THE STATUTE OF FRAUDS.

The English statute (29 Car. II. c. 3), entitled "An Act for the Prevention of Frauds and Perjuries," requires written evidence of the contracts therein mentioned before they can be enforced. This statute commonly called the Statute of Frauds, has been adopted, with slight modifications, in most of the states.

The 4th section of this statute is in force in Illinois in the following modified form:

§ 1. No action shall be brought, whereby to charge any executor or administrator upon any special promise to answer any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or

some other person thereunto by him lawfully authorized.

§ 2. No action shall be brought to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, for a longer term than one year, unless such contract, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party. This section shall not apply to sales upon execution or by any officer or person pursuant to a decree or order of any court of record in this state.

§ 3. The consideration of any such promise or agreement need not be set forth or expressed in the writing, but may be proved or disproved by parol or other legal evidence.

R. S. Ch. 59.

No contract within the provisions of the Statute of Frauds is enforceable at law,[1] unless such contract or some memorandum thereof,[2] showing who are the parties thereto,[3] and what was the promise sought to be enforced,[4] is in writing, signed[5] by the party to be charged thereby,[6] or by his agent[7] thereunto lawfully authorized.

1. A verbal contract within the statute is voidable, not void.

Townsend v. Hargraves, 118 Mass. 334.
Whitney v. Cochran, 1 Scam. 210.
Chicago Dock Co. v. Kinzie, 49 Ill. 289.

The statute does not apply to a verbal contract which has been fully performed.

Stone v. Dennison, 13 Pick. 1, 4.
Swanzey v. Moore, 22 Ill. 63.
James v. Morey, 44 Ill. 352.

A verbal contract within the statute cannot be made the ground of a defense any more than of a demand.

King v. Welcome, 5 Gray, 41, 42.
Wheeler v. Frankenthal, 78 Ill. 124, 126.
Creighton v. Sanders, 89 Ill. 543.
McGinnis v. Fernandes, 126 Ill. 228.

2. The contract may be made at one time and the memorandum of it at a subsequent time.

Lerned v. Wannemacher, 9 Allen, p. 416.
Gale v. Nixon, 6 Cow. 445, 448.

But it has been held that the memorandum must be made before the action is brought.

Bill v. Bament, 9. M. & W. 36.
Bird v. Munroe, 66 Me. 337.
Lucas v. Dixon, 22 Q. B. D. 357.

The memorandum need not pass between the parties; it may be a letter written by the party to be charged to a third person (a), or an entry in the books of such party (b).

(a) Gibson v. Holland, L. R. 1 C. P. 1, 6.
Peabody v. Speyers, 56 N. Y. 230, 237.
Moss v. Atkinson, 44 Cal. 3.
Spangler v. Danforth, 65 Ill. 152.

(b) Argus Co. v. Albany, 55 N. Y. 495.
Tufts v. Plymouth Co., 14 Allen, 407.

The memorandum may be contained in more papers than one, provided that, if any such paper is not signed as required by the statute, it must be so referred to by a paper which is thus signed (a), or so attached thereto at the time of signing (b), as to indicate the signer's intention to make it a part of the memorandum.

(a) Pierce v. Corf, L. R. 9 Q. B. 210, 217.
Kronheim v. Johnson, 7 Ch. D. 60, 67.
Morton v. Dean, 13 Met. 385, 388.
Whelan v. Sullivan, 102 Mass. 204, 206.
Peck v. Vandemark, 99 N. Y. 29, 34.
Doughty v. Manhattan Brass Co., 101 N. Y. 644.
McConnell v. Brillhart, 17 Ill. 354, 360.

(b) Tallman v. Franklin, 14 N. Y. 584, 588.
Orne v. Cook, 31 Ill. 238.

If it appears from the paper signed that another paper is referred to, the latter may be identified by parol evidence.

Long v. Millar, 4 C. P. D. 450, 456.
Beckwith v. Talbot, 95 U. S. 292.
And see Studds v. Watson, 28 Ch. D. 305, 307.
Work v. Cowhick, 81 Ill. 317, 318.
Thayer v. Luce, 22 Ohio St. 62, 74.

3. The memorandum may show who are the parties to the contract, either by naming them or by giving a description of them by which they can be identified as such.

Sale v. Lambert, L. R. 18 Eq. 1.
Catling v. King, 5 Ch. D. 660.
Jarrett v. Hunter 34 Ch. D. 182.

McConnell v. Brillhart, 17 Ill. 354.
Thornton v. Kelly, 11 R. I. 498.

4. The memorandum must show the substance of such promise with reasonable certainty (a).

In Illinois it need not set forth or express the consideration thereof (b), unless the consideration is executory and modifies the promise (c).

(a) Atwood v. Cobb, 16 Pick. 227, 230.
Frazer v. Howe, 106 Ill. 563, 574.
Peck v. Vandemark, 99 N. Y. 29, 34.

(b) R. S. Ch. 59 § 3.
Patmor v. Haggard, 78 Ill. 607.

(c) See Drake v. Seaman, 97 N. Y. 234-236.

Parol evidence, however, is admissible for the purpose of identifying the subject matter to which the writing refers.

Barry v. Coombe, 1 Pet. 640.
Tallman v. Franklin, 14 N. Y. 584.
Mead v. Parker, 115 Mass. 413.
McConnell v. Brillhart, 17 Ill. 354.
Cossitt v. Hobbs, 56 Ill. 231.

5. Ordinarily the signature is the party's name written at the end of the memorandum. But it may be his initials (a), or his mark (b); it may be printed (c), or stamped (d); and it may be at the beginning or in the middle of the memorandum (e); provided that it appears that the signer thereby intended to recognize and authenticate the memorandum and every material part thereof (f).

(a) Sanborn v. Flagler, 9 Allen, 478.
Palmer v. Stephens, 1 Denio, 478.

(b) Baker v. Dening, 8 Ad. & E. 94.
Brown v. Bank, 6 Hill, 443.

(c) Schneider v. Norris, 2 M. & S. 286.
Drury v. Young, 58 Md. 546.
Weston v. Myers, 33 Ill. 424.

(d) Bennett v. Brumfitt, L. R. 3 C. P. 30.

(e) Clason v. Bailey, 14 Johns. 484, 486.
Coddington v. Goddard, 16 Gray, 436, 444.
McConnell v. Brillhart, 17 Ill. p. 361.

(f) Caton v. Caton, L. R. 2 H. L. 127.
Boardman v. Spooner, 13 Allen, 353, 358.
Brayley v. Kelly, 25 Minn. 160.

6. The writing need not be signed by the other party to the contract. A written offer verbally accepted is binding upon the signer.

Old Colony R. R. Co. v. Evans, 6 Gray, 25, 32.
Justice v. Lang, 42 N. Y. 493, 500.
Farwell v. Lowther, 18 Ill. 255.
Perkins v. Hadsell, 50 Ill. 216.
Estes v. Furlong, 59 Ill. 302.
W. U. Tel. Co. v. R. R. Co., 86 Ill. 246.

7. The agent must be a third person, and not the other contracting party.

Bent v. Cobb, 9 Gray, 397.
Farebrother v. Simmons, 5 B. & Ald. 333.
Sharman v. Brandt, L. R. 6 Q B. 720.

If the agent signs it in his own name, the other party may show that the contract was really made with the principal.

Dykers v. Townsend, 24 N. Y. 57, 60.
Sanborn v. Flagler, 9 Allen, p. 477.
Williams v. Bacon, 2 Gray, 387, 393.
Trueman v. Loder, 11 Ad. & E. 589.

The authority of the agent need not be in writing except in the case of a contract for the sale of real property or some interest therein for a longer period than one year.

R. S. Ch. 59 §§ 1, 2.
Watson v. Sherman, 84 Ill. 267.
Chappel v. McKnight, 108 Ill. 570.
Albertson v. Ashton, 102 Ill. 50.
Lasher v. Gardner, 124 Ill. 441.

The following contracts are within the Statute of Frauds:

1. A special promise by an executor or administrator to answer any debt or damages out of his own estate.

An executor or administrator, as such, is liable only to the extent of the assets of the deceased. He may, however, for a sufficient consideration such as forbearance, promise to answer for a debt of the deceased out of his own estate. Such a collateral promise is within the statute, and written evidence thereof is essential to its enforcement. The consideration need not appear in writing, but there must be one to support the promise. The putting of a naked promise into writing does not take away the necessity of a consideration in any of the cases within the statute.

Rann v. Hughes, 7 T. R. 346, n.
Forth v. Stanton, 1 Wms. Saund. 211, n (2).

2. A special promise to answer for the debt, default, or miscarriage of another person.

Such a promise is usually called a guaranty. The plain object of the statute is to require more certain evidence to charge a party, where he does not receive the substantial benefit of the transaction, and where another is primarily liable; and thereby to afford greater security against the setting up of fraudulent demands. The statute does not change the common law as to the necessity of a consideration for the promise to answer for the liability of another, but adds the requirement that the promise be in writing. Where such promise and the principal obligation are accepted by the promisee at the same time, and together constitute the consideration passing to him, the consideration passing from him will support the promise as well as the principal obligation. In all other cases there must be an independent consideration for the promise (a). But the writing need not in any case express such consideration (b).

(a) Eddy v. Roberts, 17 Ill. 506-508.
Nelson v. Boynton, 3 Met. 399-401.
Erie Co. Bank v. Coit, 104 N. Y. 532, 537.
Underwood v. Hossack, 38 Ill. 208, 212.
Frame v. August, 88 Ill. 424.

(b) R. S. Ch. 59 § 3.

Explanation 1.—A "special promise" is a promise in fact as distinguished from a promise implied by law.

Sage v. Wilcox, 6 Conn. 85.
Goodwin v. Gilbert, 9 Mass. 510.

Explanation 2.—The phrase "debt, default, or miscarriage," includes any liability present

or future, and whether arising out of contract or out of tort.

Matson v. Wharam, 2 T. R. 80.
Matthews v. Milton, 4 Yerg. 576.
Mead v. Watson, 57 Vt. 426.
Kirkham v. Marter, 2 B. & Ald. 613.
Mountstephen v. Lakeman, L. R. 7 Q. B. p. 202.

Explanation 3.—The term "another person" here means some person other than the immediate parties to the promise; *i. e.*, a third person.

Colt v. Root, 17 Mass. 236.
Alger v. Scoville, 1 Gray, 394.
Barker v. Bucklin, 2 Denio, 60.
Prather v. Vineyard, 4 Gilm. 48.

Explanation 4.—In order to bring a promise within the statute

1. There must be at some time a liability of a third person to be answered for;[1]

2. The liability of the third person must be a continuing liability;[2]

3. The transaction must not show that the liability of the third person is to be answered for out of his own property;[3]

4. The promise must be made to the person to whom the third person is or is to become liable;[4] and

5. The promise must not be merely incidental to a transaction where the main object

of the promisor is to subserve some interest of his own.[5]

1. If goods are sold to another upon his credit, and the promise is made to answer for the debt, the promise is within the statute (a); but if goods are supplied to another upon the sole credit of the promisor, the promise to pay is not within the statute, because there is no debt of another to be answered for (b).

(a) Cahill v. Biglow, 18 Pick. 369, 371.
Blank v. Dreher, 25 Ill. 331.
See, also, Hardman v. Bradley, 85 Ill. 162.

(b) Chase v. Day, 17 Johns. 114.
Williams v. Corbet, 28 Ill. 262, 263.
Hughes v. Atkins, 41 Ill 213.
Geary v. O'Neil, 73 Ill. 593.
Schoenfeld v. Brown, 78 Ill. 487.
Owen v. Stevens, 78 Ill. 462, 464.
Hartley Bros. v. Varner, 88 Ill. 561.
See, also, Clifford v. Luhring, 69 Ill. 401.
King v. Edmiston, 88 Ill. 257.

2. A promise to pay the debt of another in consideration of that other's release from the debt, is not within the statute, because there remains no debt of another to answer for.

Meriden Britannia Co. v. Zingsen, 48 N. Y. 250.
Wood v. Corcoran, 1 Allen, 406.
Eddy v. Roberts, 17 Ill. p. 508.
Corbin v. McChesney, 26 Ill. 232.
Runde v. Runde, 59 Ill. 98.

3. Where the promisor has funds or goods in his hands belonging to the debtor, from which or from whose proceeds he has authority (a) and is under a duty (b) to pay the debt, the promise is not within the

statute, because the debt is really to be paid by debtor; the responsibility assumed by the promi being that of a trustee for the creditor (c).

(a) Gower v. Stuart, 40 Mich. 747.
Frame v. August, 88 Ill. 424.

(b) Fullam v. Adams, 37 Vt. 391, 397.
Belknap v. Bender, 75 N. Y. 446, 451.
Ackley v. Parmenter, 98 N. Y. 425, 430.

(c) Wait v. Wait, 28 Vt. 350, 352.
Farley v. Cleveland, 4 Cow. 432.
Eddy v. Roberts, 17 Ill. 505, 508.
Prather v. Vineyard, 4 Gilm. 40, 48.
Walden v. Karr, 88 Ill. 49, 51.

4. A promise to the debtor himself to pay debts is not within the statute.

Eastwood v. Kenyon, 11 A. & E. 438.
Alger v. Scoville, 1 Gray, 395.
Mersereau v. Lewis, 25 Wend. 247.
Eddy v. Roberts, 17 Ill. p. 508.
Brown v. Strait, 19 Ill. 89.
Rabbermann v. Wiskamp, 54 Ill. 179.
Wilson v. Bevans, 58 Ill. 232.
Meyer v. Hartman, 72 Ill. 442.

Nor is a mere promise of indemnity or prom to a person to save him harmless from the result a transaction into which he enters at the instanc the promisor.

Aldrich v. Ames, 9 Gray, 76.
Barry v. Ransom, 12 N. Y. 462.
Wildes v. Dudlow, L. R. 19 Eq. 198.
Anderson v. Spence, 72 Ind. 315.

For in these cases the promise is to answer the liability of the promisee, and not for that c third person.

5. In the following cases the leading purpose of the promisor is to promote some interest of his own; and accordingly the promise is not within the statute, although the debt of a third person be incidentally guaranteed.

(1) Where the holder of a promissory note transfers it for value and guarantees the payment of the note.

Cardell v. McNiel, 21 N. Y. 336, 340.
Milks v. Rich, 80 N. Y. 269, 271.
Dows v. Swett, 134 Mass. p. 142.
Darst v. Bates, 95 Ill. p. 512.

(2) Where an agent (called a *del credere* agent) undertakes, for an increased commission, to sell the goods of his employer and guarantee the solvency of the purchasers.

Wolf v. Koppel, 5 Hill, 458; 2 Denio, 368.
Couturier v. Hastie, 8 Exch. 40; 5 H. L. 673.
Swan v. Nesmith, 7 Pick. 220.
Sherwood v. Stone, 14 N. Y. 267.

(3) Where the creditor of a third person has some lien or advantage for securing the debt which incumbers the property or may injuriously affect the interests of the promisor, and the promise is made in consideration of the relinquishment of such lien or advantage.

Fitzgerald v. Dressler, 7 C. B. (N. S). 374, 392.
Wills v. Brown, 118 Mass. 137, 138.
Mallory v. Gillett, 21 N. Y. 412, 419.
Prime v. Koehler, 77 N. Y. 91, 94.
Crawford v. King, 54 Ind. 6, 10.
Eddy v. Roberts, 17 Ill. p. 508.
Scott v. White, 71 Ill. 287.

Borchsenius v. Canutson, 100 Ill. 82.
Power v. Rankin, 114 Ill. 52.

3. An agreement made upon consideration of marriage.

This clause does not apply to an agreement consisting of mutual promises to marry. In such case the consideration for each promise is not marriage itself, but a mere promise to marry (a). A promise to pay money or a settlement in consideration of, or conditional upon a marriage actually taking place, is within the statute (b).

(a) Clark v. Pendleton, 20 Conn. 495.
Short v. Stotts, 58 Ind. 29.
Blackburn v. Mann, 85 Ill. 222

(b) Caton v. Caton, L. R. 1 Ch. App. 137.
Flenner v. Flenner, 29 Ind. 564.
Henry v. Henry, 27 Ohio St. 121.
Lloyd v. Fulton, 91 U. S. 479.
McAnnulty v. McAnnulty, 120 Ill. 26.

4. An agreement not to be performed[1] within the space of one year from the making thereof.[2]

1. This clause applies only to agreements which by their terms are "not to be performed" within the year, and not to agreements which merely may not be performed within that period (a). An agreement which may be fully performed within a year is not within the statute, however improbable it may be that it will be performed within that time (b). Thus, an agreement to support a person during his life is not within the statute, because he may die within a year (c). But the possibility of a defeasance by notice or other-

wise does not make it the less a contract not to be performed within the year (d).

(a) McPherson v. Cox, 96 U. S. 404, 416.
Walker v. Johnson, 96 U. S. 424.

(b) Kent v. Kent, 62 N. Y. 560, 564.
Peters v. Westborough, 19 Pick. 364.
Fraser v. Gates, 118 Ill. 99.

(c) Heath v. Heath, 31 Wis. 223, 229.
McGregor v. McGregor, 21 Q. B. D. 424.
And see Birks v. Gillett, 13 Ill. App. 369, 375.

(d) Packet Co. v. Sickles, 5 Wal. 580, 595.
Dobson v. Collis, 1 H. & N. 81.

2. An agreement for a lease for a year to commence at a future time is within this clause of the statute.

Olt v. Lohnas, 19 Ill. 576.
Comstock v. Ward, 22 Ill. 248,
Wheeler v. Frankenthal, 78 Ill. 124.

So is an agreement for service for a period of more than a year. But if the statute is pleaded by the employer, where he has discharged the employee without cause, after part performance, the latter can recover the value thereof in an action upon an implied assumpsit.

Wm. B. Steel Works v. Atkinson, 68 Ill. 421.
Williams v. Bemis, 108 Mass. 91.
Day v. R. R. Co., 51 N. Y. p. 590.

Explanation.—An agreement is not within this clause of the statute if everything that is to be done under it is to be done within the year except the mere payment of money.

Curtis v. Sage, 35 Ill. 22, 39.
Worden v. Sharp, 56 Ill. 104.

5. A contract for the sale of lands, tenements, or hereditaments,[1] or any interest in or concerning them,[2] for a longer term than one year;[3] and such contract, if made by an agent of the party sought to be charged, is not enforceable at law, unless the authority of the agent is in writing, signed by such party.[4]

1. The words "lands, tenements, and hereditaments" are used in contra-distinction to the words "goods and chattels." They denote the subjects of Real as distinguished from Personal Property.

2. Growing crops of annual culture being raised by the industry of man (*fructus industriales*) are regarded, for most purposes, as chattel interests, and a contract for the sale of any such crop is not within the statute.

Evans v. Roberts, 5 B. & C. 829.
Jones v. Flint, 10 Ad. & E. 753.
Whipple v. Foot, 2 Johns. 418.
Ross v. Welch, 11 Gray, 235.
Bull v. Griswold, 19 Ill. 631.
Graff v. Fitch, 58 Ill. 373.
Northern v. State, 1 Ind. 113.
Marshall v. Ferguson, 23 Cal. 65.

But such natural growths of the soil as growing trees (*fructus naturales*) constitute a part of the soil, and a contract for the sale of any such growth which contemplates the passing of the property therein

before it is severed from the soil, is a contract for the sale of an interest in land.

Green v. Armstrong, 1 Denio, 550.
Smith v. Surman, 9 B. & C. 561.
Killmore v. Howlett, 48 N. Y. 569.
Slocum v. Seymour, 36 N. J. L. 138.
Pattison's Appeal, 61 Pa. St. 294.
McClintock's Appeal, 71. Pa. St. 365.
See Giles v. Simonds, 15 Gray, 441.
White v. Foster, 102 Mass. p. 378.
Marshall v. Green, 1 C. P. D. 35.

3. A contract for a lease of land for a longer term than one year is within the statute.

Warner v. Hale, 65 Ill. 395.
Creighton v. Sanders, 89 Ill. 543.

4. R. S. Ch. 59 § 2.

Explanation 1.—The statute does not apply to sales upon execution or by any officer or person pursuant to a decree or order of any court of record in this State.

R. S. Ch. 59 § 2.

Explanation 2.—A court of equity will decree a specific performance of a contract within this provision of the statute where there have been such acts of performance by the party asking relief that he would suffer an injury amounting to a fraud if the other party should not perform his part of the contract; as where possession has been taken in pursuance of a

parol contract[2] for the sale of land and the purchaser has paid the purchase money,[3] or made valuable and permanent improvements on the land.[4]

1. Wallace v. Rappleye, 103 Ill. p. 252.
Clark v. Clark, 122 Ill. p. 393
Caton v. Caton, L. R., 1 Ch. App. p. 147.
Purcell v. Miner, 4. Wal. p. 518.

In such cases the court, having general jurisdiction to relieve against frauds, applies the remedy by enforcing the contract, not because the contract, as such, is binding on the parties, but because the enforcement thereof, is the most effectual way to prevent the perpetration of a fraud.

Jacobs v. R. R. Co., 8 Cush. p. 225.
Wheeler v. Reynolds, 66 N. Y. p. 237.

2. It must appear that the possession was under and in part performance of the contract.

Wood v. Thornly, 58 Ill. 464, 469.
Pickerell v. Morss, 97 Ill. 220, 224.
Kaufman v. Cook, 114 Ill. 11.
Clark v. Clark, 122 Ill. 388.
Mahana v. Blunt, 20 Iowa, 142.
Purcell v. Miner, 4 Wal. 513.
Jacobs v. R. R. Co., 8 Cush. 224.
Miller v Ball, 64 N. Y. 292.

3. Jamison v. Dimock, 95 Pa. St. 52, 56.
Ramsey v. Liston, 25 Ill. 114.
Fitzsimmons v. Allen, 39 Ill. 440.

Mere possession is not, of itself, sufficient part performance to justify a decree for specific performance.

Glass v. Hulbert, 102 Mass. 32.
Ann Berta Lodge v. Leverton, 42 Tex. 26.
Miller v. Ball, 64 N. Y. p. 292.
Galbreath v. Galbreath, 5 Watts, p. 150.
Moore v. Small, 19 Pa. St. p. 467.
Dougan v. Blocher, 24 Pa. St. p. 34.

Nor is mere payment of the purchase money.

Temple v. Johnson, 71 Ill. 13, 16.
Gorham v. Dodge, 122 Ill. 528.
Cronk v. Trumble, 66 Ill. 428.
Horn v. Ludington, 32 Wis. 73.
Purcell v. Miner, 4 Wal. 513.
Glass v. Hulbert, 102 Mass. 28.

4. Blunt v. Tomlin, 27 Ill. 93, 101.
Moreland v. Lemasters, 4 Blackf. 383, 385.
Potter v. Jacobs, 111 Mass. 32.
Hibbert v. Aylott, 52 Tex. 530.

The same relief will be afforded in the case of a parol gift of land where the donee on the faith of the gift has taken possession and made valuable and permanent improvements.

Kurtz v. Hibner, 55 Ill. 514, 521.
Irwin v. Dyke, 114 Ill. 302, 306.
Lobdell v. Lobdell, 36 N. Y. 327.
Freeman v. Freeman, 43 N. Y. 34.
Sower v. Weaver, 84 Pa. St. 262.
Neale v. Neales, 9 Wal. 1.

The 17th section of the English statute (29 Car. II. c. 3) is in the following language:

"No contract for the sale of any goods, wares, or merchandises, for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest

to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

This section has been adopted, with slight modifications, in several of the States, but has never been in force in Illinois.

Rhea v. Riner, 21 Ill. 531.
Barrow v. Window, 71 Ill. 218.

CHAPTER IV.

CAPACITY OF PARTIES.

The following persons are incapable wholly or partially of binding themselves by contract:

Minors.
Persons of unsound mind.
Drunken persons.
Persons under conservators.
Corporations.

MINORS.

At common law, all persons under the age of twenty-one years are minors.

In Illinois, males under the age of twenty-one years, and females under the age of eighteen years are minors.

R. S. Ch. 64, § 1.

In law language minors are commonly called infants.

A minor cannot delegate an authority which can only be exercised by virtue of a power of attorney.

The appointment of an attorney by a minor to convey real property (a), or to confess a judgment (b), is absolutely void (c).

(a) Lawrence v. McArter, 10 Ohio, 37.

(b) Bennett v. Davis, 6 Cow. 393.
Knox v. Flack, 22 Pa. St. 337.

(c) Cole v. Pennoyer, 14 Ill. p. 159.
Dexter v. Hall, 15 Wal. p. 26.

But it seems that authority from a minor to make or indorse a promissory note is only voidable.

Whitney v. Dutch, 14 Mass. 463.
Hardy v. Waters, 38 Me. 451.
Hastings v. Dollarhide, 24 Cal. 208.

The contract of a minor, unless made for necessaries, or under the authority or direction of a statute[1] is voidable in his favor.[2]

1. A contract of enlistment into the army (a), or a bastardy bond (b), is binding.

(a) *In Re* Higgins, 16 Wis. 351.

(b) People v. Moores, 4 Denio, 518.
McCall v. Parker, 13 Met. 372.

2. Cole v. Pennoyer, 14 Ill. 158, 160.
Harner v. Dipple, 31 Ohio St. 72, 77.
Tucker v. Moreland, 10 Pet. 58, 71.
Reed v. Batchelder, 1 Met. 559.
Bool v. Mix, 17 Wend. 131.
Beardsley vs. Hotchkiss, 96 N. Y. 211.

Such contract is binding on the adult until avoided on the part of the minor.

Thompson v. Hamilton, 12 Pick. 425, 429.
Field v. Herrick, 101 Ill. 110.

Thus a minor can maintain an action against an adult for his breach of a promise to marry the minor.

Holt v. Ward, 2 Stra. 937.

But it has been held that a court of equity will not decree specific performance of a contract in favor of a minor, because the remedy is not mutual.

Flight v. Bolland, 4 Russ. 298.

A person not a party to such contract cannot take advantage of the minority.

Thus the maker of a promissory note cannot avoid payment to an indorsee on the ground that the indorser is a minor.

Nightingale v. Withington, 15 Mass. 272.
See also Kendall v. Lawrence, 22 Pick. 540, 543.
Beardsley v. Hotchkiss, 96 N Y., 201, 211.

But an auctioneer is not bound to accept the bid of a minor.

Kinney v. Showdy, 1 Hill, 544.

In case of the minor's death, insanity, or other disability rendering him incapable of exercising the right of election, such contract may be avoided or confirmed by his heirs,[1] personal representative,[2] or conservator.[3]

1. Illinois Land Co. v. Bonner, 75 Ill. 315.
Veal v. Fortson, 57 Tex. 487.

2. Parsons v. Hill, 8 Mo. 135.
Jefford v. Ringgold, 6 Ala. (N. S.) 547.

3. Chandler v. Simmons, 97 Mass. 508.

The guardian of a minor cannot avoid or confirm his ward's contracts, for the reason that the election, whether to avoid or confirm, is reserved to the minor until he comes of age, and a previous determination of his right by the guardian would be inconsistent with such a privilege in the ward.

Chandler v. Simmons, 97 Mass. p. 511.
Oliver v. Houdlet, 13 Mass. 240.

Such contract may be avoided by the minor either

1. During minority,[1] or

2. Before ratification after attaining majority.[2]

1. This is the settled rule as to sales and exchanges of personal property (a) and contracts for services (b).

(a) Shipman v. Horton, 17 Conn. 481.
Carr v. Clough, 26 N. H. 280.
Chapin v. Shafer, 49 N. Y. 407.
Towle v. Dresser, 73 Me. 252.

(b) Ray v. Haines, 52 Ill. 485.
Vent v. Osgood, 19 Pick. 572.

And though it is said that a minor cannot conclusively disaffirm his conveyance of real property until he comes of age, yet he may enter and take the profits in the meantime.

Bool v. Mix, 17 Wend. p. 132.
Chandler v. Simmons, 97 Mass. p. 511.

The doctrine of estoppel in *pais* is not applicable to a minor. He may avoid his contract even if he falsely represents himself as of full age. To allow a minor to give full efficacy to his contract by a mere representation would be a manifest infringement upon the policy of the law adopted for his protection.

Merriam v. Cunningham, 11 Cush. 40.
Wieland v. Kobick, 110 Ill. 16.
Sims v. Everhardt, 102 U. S. 300.
Conrad v. Lane, 26 Minn. 389.

2. Dixon v. Merritt, 21 Minn. 196, 200.
Mustard v. Wohlford, 15 Gratt. 329.
Walker v. Ellis, 12 Ill. 470.
Chapin v. Shafer, 49 N. Y. 407.

Such contract may be confirmed by the minor after attaining majority.

1. By express ratification.[1]

2. By acts which clearly evince an intention to confirm the contract.[2]

3. By omission to disaffirm the contract within a reasonable time where such omission is prejudicial to the interests of the other party,[3] or within the statutory period of limitation.[4]

1. Where a new promise is relied upon as a ratification it must be made to the other party or his agent (a), and a mere acknowledgment is not sufficient (b); there must be a direct promise or the language used must show a willingness and intention to fulfill the contract (c).

(a) Goodsell v. Myers, 3 Wend. 479
Bigelow v. Grannis, 2 Hill, 120.

(b) Ford v. Phillips, 1 Pick. 202.
Hale v. Gerrish, 8 N. H. 374.

(c) Whitney v. Dutch, 14 Mass. 460.
See also Keener v. Crull, 19 Ill. p. 191.
Carroll v. Forsyth, 69 Ill. p. 131.

If the new promise is conditional it must be shown that the condition has been fulfilled.

Everson v. Carpenter, 17 Wend. 419.
Thompson v. Lay, 4 Pick. 48.
Proctor v. Sears, 4 Allen, 95.

2. A confirmation has been implied, in cases of property bought, from the minor's retaining the possession and use of the property beyond a reasonable time (a), or from his selling or otherwise converting it to his use (b), and, in cases of property sold, from his receiving or sueing for the purchase money or other consideration (c).

(a) Boyden v. Boyden, 9 Met. 519.

(b) Boody v. McKenney, 23 Me. 517.
Henry v. Root, 33 N. Y. 551.

(c) Morrill v. Aden, 19 Vt. 505.

3. The minor's acquiescence in his deed for years after reaching his majority in view of valuable improvements made upon the land would amount to a confirmation.

Irvine v. Irvine, 9 Wal. 617, 628.
Wheaton v. East, 5 Yerg. 41, 62.
Wallace v. Lewis, 4 Harring. 75.
Davis v. Dudley, 70 Me. 236.
Prout v. Wiley, 28 Mich. 164.
Sims v. Everhardt, 102 U. S. 312.

4. As to the period within which a minor after arriving at age may disaffirm a conveyance of land in Illinois, see

Blankenship v. Stout, 25 Ill. 132.
Keil v. Healey, 84 Ill. 104.
Tunison v. Chamblin, 88 Ill. 378.
Compare R. S. Ch. 83, § 9.

If a minor avoids a contract on which he has received money or property he is bound to restore it if it is in his power to do so.

Price v. Furman, 27 Vt. 268.
Brandon v. Brown, 106 Ill. 519, 527.

Where he has during minority wasted or squandered it, he is not required to return an equivalent. If it were so, the privilege would fail to protect him when most needed. It is to guard against the improvidence which is incident to his immaturity that this privilege is allowed.

Chandler v. Simmons, 97 Mass. 508, 514.
Green v. Green, 69 N. Y. 553, 556.
Reynolds v. McCurry, 100 Ill. 356, 361.

Where services have been performed by a minor in partial or entire execution of an express contract, and he avoids it, he may recover on an implied promise, the value of the services rendered.

Gaffney v. Hayden, 110 Mass. 137.
Whitmarsh v. Hall, 3 Denio, 375.
Derocher v. Continental Mills, 58 Mc. 217.
Vehue v. Pinkham, 60 Me. 142.
Ray v. Haines, 52 Ill. 485.

A minor may bind himself to pay the reasonable value of necessaries supplied to him.

Beeler v. Young, 1 Bibb, 519.
Parsons v. Keys, 43 Tex. 557.
Earle v. Reed, 10 Met. 387.
Johnston v. Maples, 49 Ill. p. 104.

And he is liable for money paid at his request for necessaries.

Randall v. Sweet, 1 Denio, 460.
Swift v. Bennett, 10 Cush. 436.
Price v. Sanders, 60 Ind. 315.

Explanation 1.—The term "necessaries" includes all such articles, uses, and services[1] as are reasonably necessary[2] to supply the personal[3] wants[4] of a person in the circumstances and condition of life of the minor.[5]

1. Such as food, clothing, lodging, medical attendance, instruction, and the like.

Tupper v. Cadwell, 12 Met. p. 562.
McKanna v. Merry, 61 Ill. p. 179.

2. They must be suitable in quality and quantity.

Burghart v. Angerstein, 6 Car. & P. 690.
Johnson v. Lines, 6 W. & S. 80.

3. Necessaries concern the person and not the estate. The term does not include articles necessary to carry on business.

House v. Alexander, 105 Ind. 109, 110.
Mason v. Wright, 13 Met. 306.
Decell v. Lewenthal, 57 Miss. 331.
Pyne v. Wood, 145 Mass. 558.

It includes professional services of an attorney if they are necessary for the personal relief and protection of the minor.

Munson v. Washband, 31 Conn. 303.
Barker v. Hibbard, 54 N. H. 539.

4. A minor cannot bind himself for what are *prima facie* necessaries where his wants are already supplied, or he has a parent or guardian able and willing to provide for him.

Davis v. Caldwell, 12 Cush. 512.
Hoyt v. Casey, 114 Mass. 399.
Barnes v. Toye, 13 Q. B. D. 410.
Johnstone v. Marks, 19 Q. B. D. 509.
Wailing v. Toll, 9 Johns. 141.
Kline v. L'Amoreux, 2 Paige, 419, 420.
McKanna v. Merry, 61 Ill. 177, 180.

5. Peters v. Fleming, 6 M. & W. 42.
Davis v. Caldwell, 12 Cush. 512.
McKanna v. Merry, 61 Ill. 177.
Ryder v. Wombwell, L. R. 4 Ex. 32.

Explanation 2.—Necessaries for the wife and children of a minor are treated as necessaries for himself.

Cantine v. Phillips, 5 Harring. 428.
Chapple v. Cooper, 13 M. & W. p. 259.
Tupper v. Caldwell, 12 Met. p. 562.
People v. Moores, 4 Denio, p. 520.
Price v. Sanders, 60 Ind. 315.

PERSONS OF UNSOUND MIND.

A contract, other than for necessaries, made by a person who is of such unsound mind as

to be incapable of understanding its nature and effect[1] is voidable in his favor.[2]

Qualification.—When such person is not under a conservator and is apparently of sound mind, and the other contracting party has no reasonable cause to believe otherwise,[3] the contract cannot be avoided, if it is fair and has been so far performed that the other party cannot be restored to his former position.[4]

1. Dennett v. Dennett, 44 N. H. 531, 537.
Lilly v. Waggoner, 27 Ill. 396.
Baldwin v. Dunton, 40 Ill. 188.
Titcomb v. Vantyle, 84 Ill. 371.
English v. Porter, 109 Ill. 285.

2. Allis v. Billings, 6 Met. 415, 417.
Arnold v. Richmond Iron Works, 1 Gray, 434.
Ingraham v. Baldwin, 9 N. Y. 45.
Allen v. Berryhill, 27 Iowa, 534.
Eaton v. Eaton, 37 N. J. L. 108.
Burnham v. Kidwell, 113 Ill. 425.

The contract is voidable in favor of the person of unsound mind although he has brought on that condition by habitual drunkenness.

Menkins v. Lightner, 18 Ill. 282.
Bliss v. R. R. Co., 24 Vt. 424.

3. Lincoln v. Buckmaster, 32 Vt. 652.
Mathiessen &c. Co. v. McMahon, 38 N. J. L. 536.

4. Young v. Stevens, 48 N. H. 133.
Lancaster Co. Bank v. Moore, 78 Pa. St. 407.
Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541.
Fay v. Burditt, 81 Ind. 433.
Cribben vs. Maxwell, 34 Kan. 8.

Scanlan v. Cobb, 85 Ill. 296.
McCormick v. Littler, 85 Ill. 62.

A person of unsound mind may bind himself for necessaries the same as a minor.

Baxter v. Portsmouth, 5 B. & C. 170.
La Rue v. Gilkyson, 4 Pa. St. 375.
Read v. Legard, 6 Exch. 636.
Shaw v. Thompson, 16 Pick. p. 200.
Ingraham v. Baldwin, 9 N. Y. p. 48.

Even though he is under a conservator.

Sawyer v. Lufkin, 56 Me. 308.
McCrillis v. Bartlett, 8 N. H. 569.
Fruitt v. Anderson, 12 Ill. App. 421.

No insane person or idiot is capable of contracting marriage.

R. S., Ch. 89, § 2.

A contract made with a lunatic in a lucid interval is binding.

Hall v. Warren, 9 Ves. 605.
Lilly v. Waggoner, 27 Ill. 395.
McCormick v. Littler, 85 Ill. 62.

DRUNKEN PERSONS.

A contract, other than for necessaries, made by a person who is so drunk as to be incapable of understanding its nature and effect is voidable in his favor.

Gore v. Gibson, 13 M. & W. 623.

Matthews v. Baxter, L. R. 8 Ex. 132.
Johns v. Fritchey, 39 Md. 258.
Shackelton v. Sebree, 86 Ill. 616.
Bates v. Ball, 72 Ill. 108.

A less degree of drunkenness which only darkens the reason, does not render the contract voidable, unless the circumstances justify the inference that it was obtained by fraud or circumvention.

Van Horn v. Keenan, 28 Ill. 445, 448.
Murray v. Carlin, 67 Ill. 286.
Willcox v. Jackson, 51 Iowa, 208.

A drunken person may bind himself for necessaries the same as a minor.

Gore v. Gibson, 13 M. & W. pp. 626, 627.

PERSONS UNDER CONSERVATORS.

The Statute of Illinois provides as follows:

Whenever any idiot, lunatic or distracted person has any estate, real or personal; or when any person, by excessive drinking, gaming, idleness or debauchery of any kind, so spends, wastes or lessens his estate as to expose himself or his family to want or suffering, or any county, town or incorporated city, town or village to any charge or expense for the support of himself or his family, the county court of the county in which such person lives shall, on the application of any relative or creditor, or if there be neither relative or cred-

itor, then any person living in such county, order a jury to be summoned to ascertain whether such person be idiot, lunatic or distracted, a drunkard or such spendthrift; and if the jury return in their verdict that such person is idiot, lunatic or distracted, or drunkard, or so spends, wastes or lessens his estate, it shall be the duty of the court to appoint some fit person to be the conservator of such person.

Every note, bill, bond or other contract by an idiot, lunatic, distracted person or spendthrift, made after the finding of the jury, shall be void as against the idiot, lunatic, distracted person, drunkard or spendthrift, and his estate; but the person making any contract with such idiot, lunatic, distracted person or spendthrift shall be bound thereby.

Every contract made with an idiot, lunatic or distracted person before such finding, or with a drunkard or spendthrift after the application for the appointment of a conservator, may be avoided, except in favor of the person fraudulently making the same.

R. S. Ch. 86, §§ 1, 14, 15.

This statute does not apply to implied contracts or liabilities for necessaries.

McCrillis v. Bartlett, 8 N. H. 569.
Sawyer v. Lufkin, 56 Me. 308.

CORPORATIONS.

A corporation is an artificial person created by the law, and has the capacity to make contracts within the scope of the powers conferred upon it by the act of incorporation.

Louisville R. R. Co. v. Letson, 2 How. 558.
Thomas v. R. R. Co., 101 U. S. 82.
Davis v. R. R. Co., 131 Mass. 259.
Metropolitan Bank v. Godfrey, 23 Ill. 602.
Fietsam v. Hay, 122 Ill. 295.

A contract is within the scope of the powers of a corporation when it is necessary or reasonably incidental to the accomplishment of the objects for which the corporation was created, and is not expressly prohibited.

Brown v. Winnisimmet Co., 11 Allen, 334.
Curtis v. Leavitt, 15 N. Y 64.
West v. Madison Co. Ag'l Board, 82 Ill. 207.
Chicago &c. Co. v. Gaslight Co., 121 Ill. 546.

Although a contract entered into by a corporation may not be within the scope of the powers conferred upon it,[1] yet if the contract has been performed by the other contracting party, and the corporation has actually received benefit therefrom in money, property, or services[2] it will not be allowed to evade payment therefor on the ground that it was not empowered to make the contract.[3]

1. In such case the contract is said to be *ultra vires.*

2. Morville v. Tract Society, 123 Mass. 129, 138.
Whitney Arms Co. v. Barlow, 63 N. Y. 70.
Madison Av. Ch. v. Oliver St. Ch., 73 N. Y. 90.
Rider Life Raft Co. v. Roach, 97 N. Y. 381.
Parkersburg v. Brown, 106 U. S. 503.
Chapman v. County of Douglas, 107 U. S. 357.
Slater Woollen Co. v. Lamb, 143 Mass. 422.

3. Bradley v. Ballard, 55 Ill. 413.
Darst v. Gale, 83 Ill. 136.
E. St. Louis v. E. St. Louis &c. Co., 98 Ill. 415.
P. & S. R. R. Co. v. Thompson, 103 Ill. 187.
Brown v. Mortgage Co., 110 Ill. 235.

Unless restricted as to the mode of contracting, a corporation can make any contract within the scope of its powers in the same manner as a natural person would under the like circumstances.

Bank of Columbia v. Patterson, 7 Cranch, 306.
Moss. v. Averell, 10 N. Y. 454.
Peterson v. Mayor &c. of New York, 17 N. Y. 453.
Proprietors of Bridge v. Gordon, 1 Pick. 304.
Board of Education v. Greenebaum, 39 Ill. 612.
Racine &c. Co. v. Farmers &c. Co., 49 Ill. 331.
New Athens v. Thomas, 82 Ill. 259.

It may be liable even on a contract implied by law.

Seagraves v. Alton, 13 Ill. 366, 371.
Trustees v. Ogden, 5 Ohio, 23, 26.

CHAPTER V.

REALITY OF CONSENT.

It is essential to an absolutely binding contract that the consent expressed by offer and acceptance should be real.

Apparent consent is not real when it is caused by such

Mistake,
Misrepresentation,
Fraud,
Duress, or
Undue Influence,

as is hereafter described.

Consent is so caused when it would not have been given but for the existence of the mistake, misrepresentation, fraud, duress, or undue influence; and in such case the contract may be avoided by the innocent party.

In many of the cases under this rule the innocent party may avoid the contract either at law or in equity, but in some of them his sole remedy is in equity.

He must rescind the contract or seek the relief within a reasonable time after knowledge of the mistake (a), misrepresentation, or fraud (b) has been or ought to have been obtained, or after the discontinuance of the duress (c) or undue influence (d).

(a) Grymes v. Sanders, 93 U. S. 55, 61.
Diman v. R. R. Co., 5 R. I. 130.
Thomas v. Bartow, 48 N. Y. 193.
Dodge v. Ins. Co., 12 Gray, 71.

(b) Rogers v. Higgins, 57 Ill. 244.
Hall v. Fullerton, 69 Ill. 448.
Clapp v. Peterson, 104 Ill. 26, 34.
Jones v. Lloyd, 117 Ill. 597.
Bassett v. Brown, 105 Mass. 551, 556.
Nealon v. Henry, 131 Mass. 153, 155.
Schiffer v. Dietz, 83 N. Y. 300.
Baird v. Mayor, 96 N. Y. 567.
Baker v. Lever, 67 N. Y. 304, 308.
Pence v. Langdon, 99 U. S. 578, 581.

(c) Haldane v. Sweet, 55 Mich. 196.
Sims v. Everhardt, 102 U. S. p. 311.

(d) Turner v. Collins, L. R. 7 Ch. 329, 340.
Moxon v. Payne, L. R. 8 Ch. 881, 885.
Kempson v. Ashbee, L. R. 10 Ch. 15.
Jenkins v. Pye, 12 Pet. 241, 261.
Wills v. Wood, 28 Kan. 400.
McCormick v. Malin, 5 Blackf. 509, 532.
Marston v. Simpson, 54 Cal. 189.

MISTAKE.

Mistake is a ground for avoiding a contract when it is

1. Mistake as to the nature of the transaction[1] in the absence of negligence operating as an estoppel.[2]

2. Mistake as to the person with whom the contract is made.[3]

3. Mistake as to the existence of the subject-matter of the contract,[4] or

4. Mistake as to the identity of the subject-matter of the contract.[5]

1. Where a person unable to read is misinformed as to the contents of an instrument and thereby is induced to sign it under the belief that it is an instrument of an entirely different nature, he may avoid the instrument.

R. R. Co. v. Shunick, 65 Ill. 223.
Schaper v. Schaper, 84 Ill. 603.
Vanbrunt v. Singley, 85 Ill. 281.
Trambly v. Ricard, 130 Mass. 259.

2. Where a person able to read executes a deed, supposing it to be a lease, without reading the same, and thereby enables his grantee to sell the property to an innocent purchaser for value, he is bound by the deed.

Gavagan v. Bryant, 83 Ill. 376.
See also Leach v. Nichols, 55 Ill. 273.
Chapman v. Rose, 56 N. Y. 137.
Upton v. Tribilcock, 91 U. S. 50.

3. Where A sends an order for goods to B, or makes any other proposal to B, C cannot make himself a party to the contract, without the knowledge of A, by supplying the goods or otherwise accepting the proposal in the place of B. A may have a set-off against B, and in any case he has a right to the benefit he may contemplate from the character, credit, and substance of B.

Boulton v. Jones, 2 H. & N. 564.
Boston Ice Co. v. Potter, 123 Mass. 28.
Randolph Iron Co. v. Elliott, 34 N. J. L. 184.

4. Where A agrees to sell to B a certain horse which, unknown to the parties, is dead at the time of their making the agreement, there is no binding contract.

Bradford v. Chicago, 25 Ill. p. 423.
Allen v. Hammond, 11 Pet. p. 71.
Thompson v. Gould, 20 Pick. p. 139.
See also Gibson v. Pelkie, 37 Mich. 380.
Anderson v. Armstead, 69 Ill. 452.

5. Where A agreed to purchase from B a lot on Prospect street and there were two streets of that name in the town, and A meant a lot on one of these streets and B a lot on the other, it was held that there was no mutual agreement.

Kyle v. Kavanagh, 103 Mass. 356.
See also Harvey v. Harris, 112 Mass. 32.
Cutts v. Guild, 57 N. Y. 229.
Rupley v. Daggett, 74 Ill. 351.

A contract cannot be avoided on the ground of a mistake as to any law in force in this State.

This includes a mistake as to the legal effect of the terms of a contract (a), but not a mistake in drawing up a contract (b).

(a) Hunt v. Rousmaniere, 1 Pet. 1.
Bank v. Daniel, 12 Pet. 32.
Gordere v. Downing, 18 Ill. 492.
Wood v. Price, 46 Ill. 439.
Seymour v. Mackay, 126 Ill. 351.
Rice v. Dwight M'f'g Co., 2 Cush. 80.
Dodge v. Ins. Co., 12 Gray, 72.

(b) Canedy v. Marcy, 13 Gray, 373.
Pitcher v. Hennessey, 48 N. Y. 415.
Snell v. Ins. Co., 98 U. S. 85.
Broadwell v. Broadwell, 1 Gilm. p. 605.
Shafer v. Davis, 13 Ill. p. 397.
Sibert v. McAvoy, 15 Ill. p. 109.
Mills v. Lockwood, 42 Ill. 111, 117.

As a matter of necessity, all persons are conclusively presumed to know and act in view of the law of the land. The maxim is that ignorance of the law excuses no one.

Goltra v. Sanasack, 53 Ill. p. 458.
Upton v. Tribilcock, 91 U. S. p. 51.

But this maxim has no application to any foreign law. Such law is to be proved and treated as a matter of fact.

Haven v. Foster, 9 Pick. 112.
Bank of Chillicothe v. Dodge, 8 Barb. 233.
Stedman v. Davis, 93 N. Y. 32.
Chumasero v. Gilbert, 24 Ill. 293.
M. & St. P. Ry. Co. v. Smith, 74 Ill. 197.

MISREPRESENTATION.

Misrepresentation, as distinguished from fraud, is a ground for avoiding a contract when it consists in a statement or non-disclosure of the following character by one of the parties reasonably relied upon by the other and inducing him to enter into the contract.[1]

1. An untrue statement of a material fact though believed to be true by the one making it.[2]

2. The non-disclosure of a material fact by one under a special obligation to make the disclosure by reason of the fiduciary nature of the contract,[3] or the confidential relation of the parties.[4]

1. A party cannot avoid a contract on the ground of misrepresentation if he knew that the representation was untrue, or without relying thereon made independent inquiries and acted on information derived from his own investigation.

Tuck v. Downing, 76 Ill. 71.
Fauntleroy v. Wilcox, 80 Ill. 477.
Slaughter v. Gerson, 13 Wal. 379.

2. If an untrue statement by a vendor is the cause of a purchase, it is immaterial to the purchaser whether the statement was made innocently or dishonestly. Its effect as an inducement is the same whatever may have been the motive of the vendor. The purchaser is misled by the statement, and his consent is not real.

Mitchell v. McDougall, 62 Ill. 498.
Allen v. Hart, 72 Ill. 104.
Smith v. Richards, 13 Pet. 26.
Baughman v. Gould, 45 Mich. 481.
Wickham v. Grant, 28 Kan. 517.
Mulvey v. King, 39 Ohio St. 491.

Even assuming that moral fraud must be shown in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral

delinquency; no man ought to seek to take advantage of his own false statements.

Redgrave v. Hurd, 20 Ch. D. 1, 13.
Newbigging v. Adam, 34 Ch. D. 582, 593.

3. Contracts of a fiduciary nature are said to be *uberrimae fidei.* Their characteristic is that the subject matter of the contract, or a material part of it, is within the peculiar knowledge of one of the parties, and the other must rely to a considerable extent upon the statements made by him.

The contract of insurance is of this nature. The insurer trusts to the representations of the insured, and proceeds upon the understanding that he has been given all the *data* necessary to enable him properly to estimate the risk.

Lycoming Ins. Co. v. Rubin, 79 Ill. 402, 403.
Chicago &c. R. R. Co. v. Thompson, 19 Ill. 578, 589.
McLanahan v. Ins. Co., 1 Pet. 170, 185.
Ionides v. Pender, L. R. 9 Q. B. 531, 537.

It is not, however, the duty of the insured to give information to the insurer, on any fact which the latter may be presumed to know, unless inquired of; but any unusual practice or matter material to the risk must be communicated.

Clark v. Ins. Co., 8 How. 235.

4. Full disclosure of material facts is required in contracts between agent and principal, attorney and client, trustee and beneficiary, and the like, where special confidence is reposed.

Casey v. Casey, 14 Ill. 112, 114.
Norris v. Taylor, 49 Ill. 17.
Zeigler v. Hughes, 55 Ill. 288.

Ward v. Armstrong, 84 Ill. 151.
Reed v. Peterson, 91 Ill. 288.
Brooks v. Martin, 2 Wal. 84.
Baker v. Humphrey, 101 U. S. 502.

FRAUD.

Fraud, considered as a ground for avoiding a contract, consists in any of the following acts, committed by one of the parties or with his connivance,[1] with intent to induce the other to enter into the contract,[2] reasonably relied upon by the latter,[3] and actually inducing him to enter into the contract.[4]

1. A false representation of a material[5] fact[6] by one with knowledge of the falsehood or in reckless disregard of what may be the truth.[7]

2. The active concealment of a material fact by one with knowledge or belief of the fact.[8]

3. Any other act fitted to deceive.[9]

1. Kenner v. Harding, 85 Ill. 264.
Witherwax v. Riddle, 121 Ill. 140.
Adams v. Soule, 33 Vt. 538.

2. The characteristic of fraud as distinguished from misrepresentation is a dishonest intention to induce a person to enter into a contract by misrepresentation, or by such concealment as amounts to distortion of truth, and is equivalent to misrepresentation. Such intention will be inferred from a knowledge of the falsity of the representation, or where it is recklessly made as of one's own knowledge when the party knows nothing on the subject either way.

Fraud is a tort as well as a ground for avoiding a contract, and will sustain an action *ex delicto.*

Misrepresentation without a dishonest intention, as above explained, may be a ground for avoiding a contract (a), but will not sustain the action *ex delicto*, the action of deceit (b).

(a) Allen v. Hart, 72 Ill. 104.
School Directors v. Boomhour, 83 Ill. 17.
Hicks v. Stevens, 121 Ill. p. 197.
Kennedy v. McKay, 43 N. J. L. 288.
Redgrave v. Hurd, 20 Ch. D. 1.
Newbigging v. Adam, 34 Ch. D. 582.
Adam v. Newbigging, 13 App. Cas. 308.

(b) Merwin v. Arbuckle, 81 Ill. 501.
Johnson v. Beeney, 9 Ill. App. 64.
Holdom v. Ayer, 110 Ill. 448.
Lord v. Goddard, 13 How. 198.
Humphrey v. Merriam, 32 Minn. 197.
Cowley v. Smyth, 46 N. J. L. 380.

3. A party guilty of fraudulent misrepresentation will not be allowed to allege the negligence of another in relying upon it under circumstances justifying belief.

Linington v. Strong, 107 Ill. p. 302.
Ladd v. Pigott, 114 Ill. 647.
Endsley v. Johns, 120 Ill. 469.
Hicks v. Stevens, 121 Ill. 186.
Mead v. Bunn, 32 N. Y. 275.
David v. Park, 103 Mass. 501.

But the circumstance that the latter had the means of discovering the truth and used them is relevant to show that he relied upon his own judgment and not upon the misrepresentation.

Fauntleroy v. Wilcox, 80 Ill. 477.

Halls v. Thompson, 1 Sm. & M. 481.
Hagee v. Grossman, 31 Ind. 223.
Slaughter v. Gerson, 13 Wal. 379.

4. Hefner v. Vandolah, 57 Ill. 520.
Taylor v. Guest, 58 N. Y. 262.
Ming v. Woolfolk, 116 U. S. 599.

The fraudulent act need not be the sole inducement.

Ruff v. Jarrett, 94 Ill. 475.
Hicks v. Stevens, 121 Ill. 186.
Safford v. Grout, 120 Mass. 20.
Morgan v. Skiddy, 62 N. Y. 319.
Peek v. Derry, 37 Ch. D. 541.

5. A misrepresentation as to an immaterial matter does not constitute fraud in contemplation of law.

Geddes v. Pennington, 5 Dow, 159.

6. A misrepresentation as to a matter of law is not sufficient.

Fish v. Cleland, 33 Ill. 238.
Drake v. Latham, 50 Ill. 270.
Dillman v. Nadlehoffer, 119 Ill. 567.
Ins. Co. v. Reed, 33 Ohio St. 293.
Upton v. Tribilcock, 91 U. S. 50.

Nor is a misrepresentation as to a matter of opinion, belief, or expectation.

Warren v. Doolittle, 61 Ill. 171.
Tuck v. Downing, 76 Ill. 71.
Gordon v. Parmelee, 2 Allen, 212.
Mooney v. Miller, 102 Mass. 217.
Ellis v. Andrews, 56 N. Y. 83.
Chrysler v. Canaday, 90 N. Y. 272.
Sawyer v. Prickett, 19 Wal. 146.
Gordon v. Butler, 105 U. S. 553.
Southern Development Co. v. Silva, 125 U. S. 247.

7. A false representation, recklessly made without any knowledge or ground of belief, will be deemed fraudulent.

Case v. Ayers, 65 Ill. 142.
Ruff v. Jarrett, 94 Ill. 475.
Stone v. Denny, 4 Met. 151.
Litchfield v. Hutchinson, 117 Mass. 195.
Bennett v. Judson, 21 N. Y. 238.
Cooper v. Schlesinger, 111 U. S. 148.
Cabot v. Christie, 42 Vt. 121.
Peek v. Derry, 37 Ch. D. 541.

Such representation always suggests *mala fides*, since it cannot be claimed that there is any belief where there is no ground of belief. Moreover, to make a statement recklessly—without caring whether it is true or not—for the purpose of influencing another is dishonest.

8. The use of any artifice or contrivance in the sale of goods to mislead and prevent discovery of their defects is fraudulent.

Kenner v. Harding, 85 Ill. 264, 268.
Kohl v. Lindley, 39 Ill. p. 201.
Cogel v. Kniseley, 89 Ill. p. 601.
Croyle v. Moses, 90 Pa. St. 250.

So is a partial statement of fact where the withholding of that which is not stated makes that which is stated so misleading as it stands as to be in effect untrue. Here the old adage applies, that, half the truth is a lie.

Mallory v. Leach; 35 Vt. 156, 168.
Hadley v. Clinton Imp. Co., 13 Ohio St. 502, 513.
Kidney v. Stoddard, 7 Met. 252.

9. A false promise to pay for goods by a party whose object is to obtain them from the owner with his consent through the form of purchase, when the party knows that he is insolvent and intends never to pay for them, is fraudulent.

Donaldson v. Farwell, 93 U. S. 631.
Stewart v. Emerson, 52 N. H. 301.
Dow v. Sanborn, 3 Allen, 181.
Hennequin v. Naylor, 24 N. Y. 139.
Wright v. Brown, 67 N. Y. 1.
Allen v. Hartfield, 76 Ill. 358.

The promise to pay implies a representation by the party that he has confidence in his ability to pay and really intends to pay, and the concealment of his insolvency with an intention not to pay renders the promise a fraudulent misrepresentation.

But the omission of a purchaser to disclose his insolvency, unaccompanied with an intention not to pay, does not make the promise to pay fraudulent, for it is often the case that the purchaser relies, for his ability to pay, upon his credit alone, and is not disappointed.

Morrill v. Blackman, 42 Conn. 324, 329.
Nichols v. Pinner, 18 N. Y. 295.
Morris v. Talcott, 96 N. Y. 100.
Talcott v. Henderson, 31 Ohio St. 162.

And while a man is really struggling against adversity, with an honest intent to retrieve his fortunes he may make a valid purchase on credit, although he does not disclose the extent of his embarrassments, for in such a case there is wanting the fraudulent design never to pay.

Henshaw v. Bryant, 4 Scam. 97, 108.
Patton v. Campbell, 70 Ill. 72, 75.

DURESS.

Duress considered as a ground for avoiding a contract consists in any of the following acts committed or threatened[1] by one of the parties, or with his connivance,[2] and causing the other to enter into the contract.[3]

1. Unlawful[4] imprisonment[5] of the other party or the husband or wife, parent or child of such party.[6]

2. Imprisonment of such person procured through the abuse of lawful process[7] or made unjustly oppressive.[8]

3. Unlawful and great bodily harm to such person.[9]

4. Unlawful seizure, detention[10] or destruction[11] of the property of such person.

1. Bane v. Detrick, 52 Ill. 19.
Foshay v. Ferguson, 5 Hill, 154.
Taylor v. Jaques, 106 Mass. 291.
Bush v. Brown, 49 Ind. 573.

2. See Compton v. Bank, 96 Ill. 301, 306.
Green v. Scranage, 19 Iowa, 461.
Fairbanks v. Snow, 145 Mass. 153.

3. Whitefield v. Longfellow, 13 Me. 146.
Alexander v. Pierce, 10 N. H. 494.
Feller v. Green, 26 Mich. 70.
Hamilton v. Smith, 57 Iowa, 15.

There must be that degree of constraint or danger, either actually inflicted or threatened, and impending which is sufficient in severity or in appre-

hension to overcome the will of a person of ordinary firmness.

French v. Shoemaker, 14 Wal. 332.
Harmon v. Harmon, 61 Me. 227.
Miller v. Miller, 68 Pa. St. 486.
Bane v. Detrick, 52 Ill. 27.

4. Imprisonment, when lawful, is by no legal intendment an abridgment of the free and voluntary volition of the mind in the management of business transactions. It is, therefore, not sufficient to establish duress to show an imprisonment. It is necessary to show an unlawful imprisonment, or abuse of, or oppression under lawful process or legal detention.

Taylor v. Cottrell, 16 Ill. 93.
Heaps v. Dunham, 95 Ill. 583.
Kelsey v. Hobby, 16 Pet. 269.

5. Imprisonment is the restraint of personal liberty whether in prison or elsewhere.

6. Plummer v. People, 16 Ill. p. 360.
Shenk v. Phelps, 6 Ill. App. 612.
Harris v. Carmody, 131 Mass. 51.

In such cases the relation between the parties is so intimate that the constraint upon one is supposed to operate with equal force upon the other.

7. It is an abuse of criminal process to resort (a) or threaten to resort (b) to it for the purpose of coercing the payment of a private debt or demand.

(a) Bane v. Detrick, 52 Ill. 19.
Shenk v. Phelps, 6 Ill. App. 612.
Richardson v. Duncan, 3 N. H. 508.
Shaw v. Spooner, 9 N. H. 197.

Hackett v. King, 6 Allen, 58.
Seiber v. Price, 26 Mich. 518.
Osborn v. Robbins, 36 N. Y. 365.
Phelps v. Zuschlag, 34 Tex. 371.
Holbrook v. Cooper, 44 Mich. 373.

(b) Eadie v. Slimmon, 26 N. Y. 9.
Taylor v. Jaques, 106 Mass. 291.
Harris v. Carmody, 131 Mass. 51.
Town of Sharon v. Gager, 46 Conn. 189.
Foley v. Greene, 14 R. I. 618.
First Nat. Bank v. Bryan, 62 Iowa, 42.
Hullhorst v. Scharner, 15 Neb. 57.
Schoener v. Lissauer, 107 N. Y. 111.

8. Schommer v. Farwell, 56 Ill. 542, 544.
Watkins v. Baird, 6 Mass. 506, 511.
Severance v. Kimball, 8 N. H. 386, 388.

As where the imprisonment is accompanied by such circumstances of unnecessary pain, privation, or danger that by them the party is induced to enter into the contract.

9. Brown v. Pierce, 7 Wal. 205, 214.
Baker v. Morton, 12 Wal. 150, 157.
Bane v. Detrick, 52 Ill. p. 26.

Free consent is the essence of every contract, and if there be compulsion there is no consent, and moral compulsion, such as that produced by threats to take life, or to inflict great bodily harm, as well as that produced by imprisonment, has always been regarded as sufficient in law to destroy free agency.

10. The principle applies where money is paid or a note given to prevent the seizure of goods under a warrant for the collection of an illegal assessment or tax (a), or an execution fraudulently obtained (b).

(a) Bradford v. Chicago, 25 Ill. 411, 418–23.
Boston &c. Co. v. Boston, 4 Met. 181.
Bruecher v. Port Chester, 101 N. Y. 240.

(b) Thurman v. Burt, 53 Ill. 129.

So where money is paid or a note given to release goods from an attachment fraudulently obtained.

Chandler v. Sanger, 114 Mass. 364.
Collins v. Westbury, 2 Bay, 211.
Spaids v. Barrett, 57 Ill. 289.

And where money or a note is illegally exacted by a carrier (a), or collector of duties (b), or other person as a condition to the delivery of goods or valuable papers (c).

(a) Harmony v. Bingham, 12 N. Y. 99.
Beckwith v. Frisbie, 32 Vt. 559.

(b) Elliott v. Swartwout, 10 Pet. 137.
Maxwell v. Griswold, 10 How. 242.

(c) White v. Heylman, 34 Pa. St. 142.
Scholey v. Mumford, 60 N. Y. 498.
McPherson v. Cox, 86 N. Y. 472.
Pemberton v. Williams, 87 Ill. 15.

11. Spaids v. Barrett, 57 Ill. 289, 292.
Motz v. Mitchell, 91 Pa. St. 114.
Foshay v. Ferguson, 5 Hill, p. 158.
United States v. Huckabee, 16 Wal. p. 432.

Liberty and life are justly dear to all men, and so is the exclusive right to possess, dispose of, and protect from destruction one's property. The desire for property is a strong and predominant characteristic of man, in organized society. An act done, prompted by this desire to preserve, and impelled by fear of the destruction of goods, is not voluntary.

UNDUE INFLUENCE.

A contract may be avoided on the ground of undue influence when one of the parties has induced the other to enter into the contract by the unconscientious use of power afforded by

1. The parental,[1] fiduciary or confidential[2] relations subsisting between them.[3]

2. The mental weakness of the other,[4] or

3. The necessities or extravagance of an expectant heir[5] or one sustaining that character.[6]

1. Taylor v. Taylor, 8 How. 183.
Miskey's Appeal, 107 Pa. St. 611.

The term "parental" here extends to any person *in loco parentis.*

Archer v. Hudson, 7 Beav. 551.
Brown v. Burbank, 64 Cal. 99.
Berkmeyer v. Kellerman, 32 Ohio St. 239.
Highberger v. Stiffler, 21 Md. 338.
Bowe v. Bowe, 42 Mich. 195.

2. The relations between guardian and ward (a), attorney and client (b), trustee and beneficiary (c), and the like (d), are examples of fiduciary and confidential relations.

(a) Ashton v. Thompson, 32 Minn. 25.
Wickizer v. Cook, 85 Ill. 68.

(b) Jennings v. McConnel, 17 Ill. 148.
Zeigler v. Hughes, 55 Ill. 288.

(c) Ward v. Armstrong, 84 Ill. 151.
Jones v. Lloyd, 117 Ill. 597.

(d) Dent v. Bennett, 4 Myl. & Cr. 269.
Cadwallader v. West, 48 Mo. 483.
Woodbury v. Woodbury, 141 Mass. 329.
Ford v. Hennessy, 70 Mo. 580.
Caspari v. First German Church, 82 Mo. 649.
Marx v. McGlynn, 88 N. Y. 357.
Drake's Appeal, 45 Conn. 9.
Allcard v. Skinner, 36 Ch. D. 145.
Darlington's Appeal, 86 Pa. St. 512.
Boyd v. De La Montagnie, 73 N. Y. 498.
Pierce v. Pierce, 71 N. Y. 154.
Rockafellow v. Newcomb, 57 Ill. 186.

The principle applies to every case where confidence on the one side and influence on the other exist.

McCormick v. Malin, 5 Blackf. 509, 523.
Casey v. Casey, 14 Ill. 112, 115.
Norris v. Tayloe, 49 Ill. 17, 22.
Reed v. Peterson, 91 Ill. 288, 295.
Long v. Mulford, 17 Ohio St. 484, 504.
Sands v. Sands, 112 Ill. 225, 232.
Sears v. Shafer, 6 N. Y. 268, 272.
Fisher v. Bishop, 108 N. Y. 25.
Todd v. Grove, 33 Md. 188, 194.
McClure v. Lewis, 72 Mo. 314, 322.
Haydock v. Haydock, 34 N. J. Eq. 570, 574.
Cherbonnier v. Evitts, 56 Md. 276, 294.

Confidence and influence in a transaction may be presumed from the special relation of the parties, or they may be proved by extrinsic evidence. But when they are shown to exist in either way the burden of proving the fairness of the transaction is thrown upon the party holding the position of influence.

Casey v. Casey, 14 Ill. 112, 114.
Jennings v. McConnel, 17 Ill. 148.
Zeigler v. Hughes, 55 Ill. 288.

Ward v. Armstrong, 84 Ill. 151.
Sands v. Sands, 112 Ill. 225.
Jones v. Lloyd, 117 Ill. 597.
Cowee v. Cornell, 75 N. Y. p. 99.
Fisher v. Bishop, 108 N. Y. 25.
Greenfield's Estate, 14 Pa. St. 489, 505.

3. Where a relation of confidence is once established it will not be considered as determined whilst the influence derived from it can be reasonably supposed to remain.

Thus, the influence of a parent or guardian or one *in loco parentis* is presumed to continue for some time after the termination of the minority or dependence until there is what may be called a complete emancipation, so that a judgment may be formed independent of any sort of control.

Archer v. Hudson, 7 Beav. 551, 560.
Garvin v. Williams, 44 Mo. 465; S. C. 50 Mo. 206.
Miller v. Simonds, 72 Mo. 669.
Ashton v. Thompson, 32 Minn. 25.

And the principle applies to every other relation of confidence.

Mason v. Ring, 3 Abb. App. Dec. 210, 213.
Rhodes v. Bate, L. R. 1 Ch. 252, 260.
Mitchell v. Homfray, 8 Q. B. D. 587, 591.
And see Henry v. Raiman, 25 Pa. St. 354, 358.

4. The mind may be enfeebled by old age, sickness, great distress, or other cause whereby it is rendered incapable of resisting undue pressure.

Allore v. Jewell, 94 U. S. 506, 511.
Griffith v. Godey, 113 U. S. 89, 95.
Taylor v. Atwood, 47 Conn. 498.
Moore v. Moore, 56 Cal. 89.

Rau v. Von Zedlitz, 132 Mass. 164.
Rider v. Miller, 86 N. Y. 507.
Oard v. Oard, 59 Ill. 46.

But mere mental weakness will not authorize a court of equity to set aside a contract, if such weakness does not amount to inability to comprehend the meaning and effect of the contract, and is unaccompanied by evidence of imposition or undue influence.

Willemin v. Dunn, 93 Ill. 511.
Kimball v. Cuddy, 117 Ill. 213, 218.

5. An expectant heir, in real or imaginary need of money and exposed to the temptation of raising it on his expectancy, is at such a disadvantage as to be peculiarly liable to imposition, and to require an extraordinary degree of protection.

Aylesford v. Morris, L. R. 8 Ch. 484.
Boynton v. Hubbard, 7 Mass. 112.
Jenkins v. Pye, 12 Pet. p. 257.
See Mastin v. Marlow, 65 N. C. 695.
Bacon v. Bonham, 33 N. J. Eq. 614.
Parsons v. Ely, 45 Ill. 232.

6. The principle applies to an expectant devisee or legatee.

But as to contracts with the owner of a reversion or vested remainder,

See Cribbins v. Markwood, 13 Gratt. 495, 499.
Davidson v. Little, 22 Pa. St. 245.
Parmelee v. Cameron, 41 N. Y. 392.

Explanation.—If it is once established that a person who stands in a position of commanding influence towards another has obtained a

considerable advantage from him while in that position, it will be presumed, in the absence of rebutting proof, that the advantage was obtained by means of that influence.

Dent v. Bennett, 4 Myl. & Cr. 269, 277.
Woodbury v. Woodbury, 141 Mass. 329, 332.

CHAPTER VI.

LEGALITY OF OBJECT.

The courts will not enforce an agreement the object of which is forbidden by law,[1] or is opposed to the policy of the law.[2]

1. It is immaterial whether the object of the agreement is forbidden by the common law or by a statute.

Wheeler v. Russell, 17 Mass. 258, 281.
Munsell v. Temple, 3 Gilm. 93, 96.
Nash v. Monheimer, 20 Ill. 215, 217.
Wells v. People, 71 Ill. 532.
Byrd v. Hughes, 84 Ill. 174.

An agreement to commit a crime cannot be enforced, whether the offense is indictable at common law or under a statute.

Collins v. Blantern, 2 Wils. 347, 350.
Henderson v. Palmer, 71 Ill. 579, 583.

Nor can an agreement to do a civil wrong; as an agreement to commit a trespass, or print a libel (a) or practice a fraud upon a third person (b).

(a) Hatch v. Mann, 15 Wend. p. 45–6.
Clay v. Yates, 1 H. & N. 73.

(b) As where a private stipulation is made by one creditor for some advantage to himself over other creditors who unite with him in a composition of their debts.

Hefter v. Cahn, 73 Ill. 296.
Sternburg v. Bowman, 103 Mass. 325.
Huckins v. Hunt, 138 Mass. 366.
Bliss v. Matteson, 45 N. Y. 22.
See also Materne v. Horwitz, 101 N. Y. 469.
White v. Kuntz, 107 N. Y. 518.
Randall v. Howard, 2 Black, 585.
Bartle v. Coleman, 4 Pet. 184.

It is immaterial whether the thing forbidden by law is *malum in se* or merely *malum prohibitum*.

Penn v. Bornman, 102 Ill. 523, 530.
Bank v. Owens, 2 Pet. 527, 539.
White v. Buss, 3 Cush. 448, 450.

2. Oscanyan v. Arms Co., 103 U. S. 261, 267–8.
Forsyth v. Woods, 11 Wal. 484, 487.
Bliss v. Lawrence, 58 N. Y. 442.
Rice v. Wood, 113 Mass. 133.
Holcomb v. Weaver, 136 Mass. 265.
Tyler v. W. U. Tel. Co. 60 Ill. 421.
Linder v. Carpenter, 62 Ill. 309.
Paddock v. Robinson, 63 Ill. 99.
Jerome v. Bigelow, 66 Ill. 452.
Gillett v. Logan County, 67 Ill. 257.
Paton v. Stewart, 78 Ill. 481.
Craft v. McConoughy, 79 Ill. 346.
Hamilton v. Hamilton, 89 Ill. 349.
Ray v. Mackin, 100 Ill. 246.
Chicago &c. Co. v. Gas Light Co. 121 Ill. 530.
Cothran v. Ellis, 125 Ill. 496.

Explanation.—A statute may forbid the performance or omission of an act by express prohibition or by implication.[1]

A penalty imposed by statute implies a prohibition unless the penalty be in the nature of a tax or merely to secure the revenue.[2]

1. Hunt v. Knickerbacker, 5 Johns. 327, 333.
Eaton v. Kegan, 114 Mass. 433, 435.

2. Thus where a statute imposed a penalty for the failure of a dealer in milk to have the measures used in the sale of milk sealed by the proper officer, it was held that this prohibited sales of milk in measures not sealed and the price of milk so sold could not be recovered.

Miller v. Post, 1 Allen, 434, 435.
See also Pray v. Burbank, 10 N. H. 377.

But where a statute imposed a penalty for the failure of a wholesale dealer to pay the internal revenue tax, it was held that this did not invalidate sales made during the period of such default, or prevent recovery of the price of the goods sold.

Larned v. Andrews, 106 Mass. 435, 439.
See also Ruckman v. Bergholz, 37 N. J. L. 437.

In the former case the object of the statute was the protection of purchasers of milk, in the latter it was the protection of the revenue.

Where the statute imposes a penalty for retailing intoxicating liquors without a license, such sales are thereby prohibited because the object of the statute is mainly to diminish the evils of intemperance and not merely to secure a revenue.

Lewis v. Welch, 14 N. H. 294, 296–7.
Griffith v. Wells, 3 Denio, 226.

The following are the leading classes of agreements opposed to the policy of the law:

1. Agreements which tend to injure the public service.

Of this character is an agreement to use one's influence to secure the election (a) or appointment (b) of a person to a public office.

(a) Gaston v. Drake, 14 Nev. 175.
Nichols v. Mudgett, 32 Vt. 546.

(b) Gray v. Hook, 4 N. Y. 449.
Filson v. Himes, 5 Pa. St. 452.

So is an agreement which contemplates the use of private influence to procure some desired legislation (a), the pardon of a convict (b), judicial clemency (c), or the favorable action of any public servant (d).

(a) Marshall v. R. R. Co., 16 How. 314, 334.
Trist v. Child, 21 Wal. 441.
Frost v. Belmont, 6 Allen, 152.
Mills v. Mills, 40 N. Y. 543.

(b) Hatzfield v. Gulden, 7 Watts, 152.
Kribben v. Haycraft, 26 Mo. 396

(c) Buck v Bank, 27 Mich. 293.

(d) Meguire v. Corwine, 101 U. S. 108.
Cook v. Shipman, 24 Ill. 614; S. C. 51 Ill. 316.
Devlin v. Brady, 36 N. Y. 531.

The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country.

Tool Co. v. Norris, 2 Wal. 45, 56.
Oscanyan v. Arms Co., 103 U. S. 261, 273.

On the ground that a railroad corporation is a *quasi* public agency an agreement between the corporation and an individual to establish a station at a particular place (a), or not to establish it within a certain distance of a given point (b) is held to be contrary to public policy and cannot be enforced.

(a) Fuller v. Dame, 18 Pick. 472, 481–3.
Bestor v. Wathen, 60 Ill. 138.
Marsh v. R. R. Co., 64 Ill. 414.
Pacific R. R. Co. v. Seely, 45 Mo. 212.

(b) St. Louis &c. R. R. Co. v. Mathers, 71 Ill. 592; S. C. 104 Ill. 257.
St. Joseph &c. R. R. Co. v. Ryan, 11 Kan. 602.
Williamson v. R. R. Co. 53 Iowa, 126.

2. Agreements which tend to obstruct the course of public justice.

As an agreement to compound or stifle a criminal prosecution.

Henderson v. Palmer, 71 Ill. 579, 583.
Wolf v. Fletemeyer, 83 Ill. 418.
Roll v. Raguet, 4 Ohio, 400, 418.
Gorham v. Keyes, 137 Mass. 583.
McMahon v. Smith, 47 Conn. 221.

A person may receive compensation for the private injury occasioned by the commission of a criminal offense.

R. S. Ch. 38 § 43.
Bothwell v. Brown, 51 Ill. 234, 236.
Schommer v. Farwell, 56 Ill. 542, 544.
Shenk v. Phelps, 6 Ill. App. 612, 620.

3. Agreements which tend to encourage litigation.

Such as agreements amounting to or being in the nature of maintenance or champerty.

Maintenance is where a person officiously intermeddles in a suit that in nowise belongs to or concerns him by assisting either party with money or otherwise, to prosecute or defend the suit with a view to promote litigation.

But it is not considered maintenance for a man to maintain the suit of his kinsman or servant or any poor person out of charity.

R. S. Ch. 38 § 27.
Harris v. Brisco, 17 Q. B. D. 504.

Champerty is maintenance aggravated by an agreement to have a part of the thing in dispute.

Thompson v. Reynolds, 73 Ill. 11, 13.
Gilbert v. Holmes, 64 Ill. 548.
Coleman v. Billings, 89 Ill. 183.
Park Commissioners v. Coleman, 108 Ill. 591.
Torrence v. Shedd, 112 Ill. 466.
Phillips v. South Park Comrs., 119 Ill. 626.

Of a similar nature is the sale of a mere right to sue.

Norton v. Tuttle, 60 Ill. 130, 134.
M. & M. R. R. Co. v. R. R. Co. 20 Wis. 174.
Brush v. Sweet, 38 Mich. 574.
Dayton v. Fargo, 45 Mich. 153.

For all cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce.

4. Agreements which involve sexual immorality.

Wallace v. Rappleye, 103 Ill. 229, 249.
Hanks v. Naglee, 54 Cal. 51.

5. Agreements which unduly affect the freedom[1] or security[2] of marriage.

1. An agreement in unreasonable restraint of marriage is invalid.

Hartley v. Rice, 10 East, 22.
Sterling v. Sinnickson, 2 South. (N. J.) 756.
Chalfant v. Payton, 91 Ind. 202.
Shackelford v. Hall, 19 Ill. p. 215.

So is an agreement to procure or bring about a marriage for reward, which is commonly called a marriage brocage contract.

Crawford v. Russell, 62 Barb. 92.
Johnson v. Hunt, 81 Ky. 321.

2. An agreement between husband and wife providing for a possible separation in the future is invalid because it tends to facilitate a separation.

Westmeath v. Westmeath, 1 Dow. & Cl. 519, 541.
Hindley v. Westmeath, 6 B. & C. 200, 212.
People v. Mercein, 8. Paige, 47, 68.

But where a separation has taken place, or an immediate separation has been decided upon, it is not unlawful for the husband and wife to provide for their rights and liabilities during the separation.

Walker v. Walker, 9. Wal. 743.
Fox v. Davis, 113 Mass. 255.
Carson v. Murray, 3 Paige, 483.
Pettit v. Pettit, 107 N. Y. 677.
Wells v. Stout, 9 Cal. 479.
Randall v. Randall, 37 Mich. 563.
McGregor v. McGregor, 20 Q. B. D. p. 533; S. C. 21 Q. B. D. 424.

6. Agreements in unreasonable restraint of trade.

Agreements in general restraint of trade are invalid because they deprive the public of the services of men in the spheres in which they are likely to be most useful, and expose the community to the evils of monopoly.

Alger v. Thatcher, 19 Pick. 51, 54.
Bishop v. Palmer, 146 Mass. 469, 474.
Keeler v. Taylor, 53 Pa. St. 467, 469.
Morris &c. Co. v. Coal Co., 68 Pa. St. 173, 184.
Arnot v. Coal Co., 68 N. Y. 558, 565.
Craft v. McConoughy, 79 Ill. 346, 349.
Talcott v. Brackett, 5 Ill. App. p. 67.
Davies v. Davies, 36 Ch. D. 359.

But an agreement in partial restraint of trade will be upheld where the restriction does not go as to its extent in space or otherwise beyond what is reasonably necessary to protect the favored party, regard being had to the nature of the business and the interests of the public.

Oregon Nav. Co. v. Winsor, 20 Wal. 64, 67.
Gilman v. Dwight, 13 Gray, 356, 359.
Chappel v. Brockway, 21 Wend. 157, 161.
Wiley v. Baumgardner, 97 Ind. 66.
Craft v. McConoughy, 79 Ill, p. 350.
Diamond Match Co. v. Roeber, 106 N. Y. 473.

Thus a professional man or any other person engaged in legitimate business, on selling his good will may bind himself not to resume practice or business within what is under the circumstances reasonable bounds.

Linn v. Sigsbee, 67 Ill. 75, 80.

McClurg's Appeal, 58 Pa. St. 51, 53.
Hubbard v. Miller, 27 Mich. 15 19.
Dwight v. Hamilton, 113 Mass. 175.
Boutelle v. Smith, 116 Mass. 111.

The general doctrine does not apply to the sale of secret processes, or patent rights, because the public has no rights in the former and the latter are monopolies authorized by the government itself for the encouragement of inventions.

Vickery v. Welch, 19 Pick. 523, 527.
Jarvis v. Peck, 10 Paige, 118, 123.
Peabody v. Norfolk, 98 Mass. 452, 457.
Morse &c. Co. v. Morse. 103 Mass. 73, 74.
Mackinnon Pen Co. v. Ink Co., 48 N. Y. Super. Ct. 442, 447.

7. Agreements to suppress competition at sales by auction.

An agreement not to bid at a public sale, if made for the purpose of stifling competition, is unlawful.

Gardiner v. Morse, 25 Me. 140, 143.
Slingluff v. Eckel, 24 Pa. St. 472, 473.
Loyd v. Malone, 23 Ill. 43, 48.
Wooten v. Hinkle, 20 Mo. 290, 292.
And see Gibbs v Smith, 115 Mass. 592.
Atcheson v. Mallon, 43 N. Y. 147.
Ray v. Mackin, 100 Ill. 246.
Hunter v. Pfeiffer, 108 Ind. 197.

But an agreement between two or more persons that one shall bid for the benefit of all will be upheld where the object of the arrangement is to raise, by a union of their means, the requisite purchase money, or to make a division of the property for their accommodation, or to protect existing interests, or any similar fair object.

Smull v. Jones, 1 W. & S. 128, 136;
S. C. 6 W. & S. 122, 127.
Phippen v. Stickney, 3 Met. 384, 388.
Switzer v. Skiles, 3 Gilm. 529. 535.
Kearney v. Taylor, 15 How. 494, 519.
Garrett v. Moss, 20 Ill. 549, 552.
Wicker v. Hoppock, 6 Wal. 94, 97.
Marie v. Garrison, 83 N. Y. 14, 27.

Where an agreement innocent in itself is designed by one of the parties to further a purpose forbidden by law or opposed to the policy of the law, the courts will not enforce it in favor of such party, or of the other party if he is implicated in such design.

The *rent* of property leased with knowledge that the lessee intends to use it for an illegal or immoral purpose cannot be recovered.

Sherman v. Wilder, 106 Mass. 537, 539.
Riley v. Jordan, 122 Mass. 231.
Edelmuth v. McGarren, 4 Daly (N. Y.) 467.
Ralston v. Boady, 20 Ga. 449.

In such case knowledge by the lessor of the intended use of his property implies consent to that use and thus implicates him in the design.

And there are cases of *sale* where the bare knowledge of the use to which the article sold is to be put will prevent recovery of the price. If a person sells arsenic with knowledge that the purchaser intends to poison another with it, the enormity of the offense intended is such as to render it morally certain that the conscience of the seller would have prevented

him from making the sale had he not participated in the design.

Hanauer v. Doane, 12 Wal. 342, 346.
Tracy v. Talmage, 14 N. Y. p, 215.
Tatum v. Kelley, 25 Ark. 209, 211.

But knowledge by the seller that the property he sells is designed by the purchaser to be used for an unlawful purpose, not *malum in se*, will not prevent recovery of the price (a) unless it appears from some stipulation or act of the seller (b), or from the circumstances of the case (c), that he made the sale with the view of aiding in the accomplishment of such purpose.

(a) Tracy v. Talmage, 14 N. Y. 162, 176, 215.
Green v. Collins, 3 Clif. C. C. 494, 500.
Bickel v. Sheets, 24 Ind. 1, 4.

(b) Arnot v. Pittston &c. Coal Co. 68 N. Y. 558, 567.
Gaylord v. Soragen, 32 Vt. 110, 113.
Aiken v. Blaisdell, 41 Vt. 655, 668.
Banchor v. Mansel, 47 Me. 58, 61.
Skiff v. Johnson, 57 N. H. 475, 478.
Foster v. Thurston, 11 Cush. 322, 323.
Webster v. Munger, 8 Gray, 584, 588.

(c) White v. Buss, 3 Cush. 448.
Tracy v. Talmage, 14 N. Y. p. 214.

Where the intended use does not involve moral turpitude it is generally a matter of such indifference to the seller that the mere knowledge thereof is not regarded as affording sufficient evidence to implicate him in the design.

Where an agreement is unenforceable by a party thereto under either of the last two rules,

money paid or property delivered by him under it cannot be recovered back nor can the agreement be set aside at his suit[1] except in the following cases:

1. Where such party was induced to enter into the agreement under circumstances of oppression or imposition.[2]

2. Where the object or design which renders the agreement unenforceable—not being *malum in se*—remains unexecuted.[3]

3. Where a statute or its efficient enforcement authorizes or requires such relief.[4]

1. It is the general policy of the law not to afford a party to an unlawful agreement assistance, except so far as the simple refusal to enforce the agreement is unavoidably beneficial to him when acting on the defensive (a). And, therefore, where he has paid money (b), or delivered goods (c), or conveyed real estate (d) under such agreement the court will in general leave him in the position in which he has placed himself. The general rule is expressed by the maxim *in pari delicto potior est conditio defendentis.*

(a) Miller v. Marckle, 21 Ill. 152, 154.
Skeels v. Phillips, 54 Ill. 309.

(b) Neustadt v. Hall, 58 Ill. 172.

(c) Myers v. Meinrath, 101 Mass. 366.

(d) St. Louis &c. R. R. Co. v. Mathers, 71 Ill. 592; S. C 104 Ill. 257.

2. Baehr v. Wolf, 59 Ill. 470, 474.
Ford v. Harrington, 16 N. Y. 285, 290.

Barnes v. Brown, 32 Mich. 146.
Davidson v. Carter, 55 Iowa, 117.
Belding v. Smythe, 138 Mass. 530.

In cases where both parties are *in delicto* concerning an illegal act, it does not always follow that they stand *in pari delicto*, for there may be, and often are, different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age, so that his guilt may be far less in degree than that of his associate in the offence. The latter can not make use of his peculiar power over another under such circumstances to procure an illegal agreement, and then invoke the aid of the law to enable him to retain that which he has thus wrongfully obtained.

3. While the illegal purpose is executory there is a *locus poenitentiae*.

Spring Co. v. Knowlton, 103 U. S. 49, 58.
Skinner v. Henderson, 10 Mo. 205, 207.
Adams Ex. Co. v. Reno, 48 Mo. 264, 268.

4. In Illinois the loser by gaming or betting is allowed to recover back from the winner his loss where at any time or sitting it amounts in the whole to the sum of $10.

R. S. Ch. 38, § 132.
Tatman v. Strader, 23 Ill. 493.
Richardson v. Kelly, 85 Ill. 491.

And where the object of a statute is to protect one class of persons against another class its efficient enforcement often requires such relief.

Thus, a party, who had deposited money in a bank repayable at a *future* day, in violation of a statute, was allowed to recover back the deposit. To have decided otherwise would have given effect to an illegal contract in favor of the principal offender, and would have operated as a reward for an offense which the statute was intended to prevent.

White v. Franklin Bank, 22 Pick. 181, 188.
Atlas Bank v. Nahant Bank, 3 Met. 581, 585.
Tracy v. Talmage, 14 N. Y. 162, 185.
Parkersburg v. Brown, 106 U. S. 487, 503.

THE INTERPRETATION OF CONTRACT.

CHAPTER VII.

RULES.

The following are the leading rules of construction which govern the interpretation of contracts in cases of doubt:

Where there is no doubt there is no room for construction.

Walker v. Tucker, 70 Ill. 527, 532.
Canterberry v. Miller, 76 Ill. 355.
Williamson vs. McClure, 37 Pa. St. 409.
Dwight v. Ins. Co., 103 N. Y. 347.

In construing a contract the controlling consideration is to discover and give effect to the mutual intention of the parties.

Walker v. Douglas, 70 Ill. 445, 448.
Field v. Leiter, 118 Ill. 17.
C. B. & Q. R. R. Co. v. Aurora, 99 Ill. 205.
Hunter v. Miller, 6 B. Mon. 619.
Flagg v. Eames, 40 Vt. 21.

The object of all rules of construction is to arrive at the meaning of the parties, and not to impose one upon them.

Gray v. Clark, 11 Vt. 583, 585.
Smith v. Brown, 5. Gilm. 309, 314.

Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.

Ford v. Beech, 11 Q. B. 852, 866.
Walker v. Douglas, 70 Ill. 445, 448.
Canal Co. v. Hill, 15 Wal. 94, 103.

Punctuation may sometimes shed light upon the meaning of the parties, but is never allowed to overturn what seems the plain meaning of the whole contract.

Osborn v. Farwell, 87 Ill. 89.
White v. Smith, 33 Pa. St. 188.
Ewing v. Burnet, 11 Pet. 54.

The whole of the contract is to be considered, and each part so construed with the others that all of them may, if possible, have some effect.

McCarty v. Howell, 24 Ill. 341.
Davis v. Rider, 53 Ill. 417.
Bowman v. Long, 89 Ill. 19.
C. B. & Q. R. R. Co. v. Aurora, 99 Ill. 205.
Goosey v. Goosey, 48 Miss. 217.
Ward v. Whitney, 8 N. Y. 446.
Heywood v. Perrin, 10 Pick. 230.

We must presume that each part was inserted for a purpose and has its office to perform. *Ex antecedentibus et consequentibus fit optima interpretatio.*

Alton v. Transportation Co. 12 Ill. 56.

We should make the parties their own interpreters, and allow one part of the contract to explain another part, as far as possible.

Stout v. Whitney, 12 Ill. 228.

Every part is to be construed with reference to the whole. Thus, covenants, releases, and other operative parts of instruments framed in general terms are construed as restricted to the objects specified in recitals, unless the language used admits of no doubt as to the extent of their operation.

Bell v. Bruen, 1 How. 169, 184.
Jackson v. Stackhouse, 1 Cow. 122.
Rich v. Lord, 18 Pick. 322.
Walsh v. Trevanion, 15 Q. B. 751.
Walker v. Tucker, 70 Ill. 537.

The words of a contract are to be understood in their ordinary and popular sense,[1] unless by the usage of trade or otherwise, they have, in respect to the subject-matter, acquired a peculiar sense.[2]

1. Hawes v. Smith, 12 Me. 429.
Stearns v. Sweet, 78 Ill. 446.
Stettauer v. Hamlin, 97 Ill. 312.
Royal Templars v. Curd, 111 Ill. 284.

2. Coit v. Ins. Co., 7 Johns. 385.
Lonergan v. Stewart, 55 Ill. 44.
Myers v. Walker, 24 Ill. 133.
Callahan v. Stanley, 57 Cal. 476.

The terms of mercantile contracts are to be understood in the sense which they have acquired from mercantile usage. And such a usage will be

considered as established when it has existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made with reference to it.

Smith v. Wright, 1 Caines, 45.
Bissell v. Ryan, 23 Ill. 566, 571.
Packard v. VanSchoick, 58 Ill. 79.

Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate,[1] unless clearly used in a different sense.[2]

1. Reed v. Hobbs, 2 Scam. 297.
Dana v. Fiedler, 12 N. Y. 40.
Ellmaker v. Ellmaker, 4 Watts, 89.
Gauch v. Ins. Co. 88 Ill. 251, 256.

2. Jackson v. Myers, 3 Johns. 388.
Bowman v. Long, 89 Ill. 19, 21.
Home Ins. Co. v. Favorite, 46 Ill. 270.

If the expressions and phrases used by unprofessional men in their various negotiations were always to be taken in their technical sense, the interpretation would often violate their true intent and meaning.

Wynkoop v. Cowing, 21 Ill. 581.

The words of a contract are to be construed with reference to its subject-matter[1] and the circumstances under which it was made.[2]

1. Field v. Woodmancy, 10 Cush. 427, 431.
Edelman v. Yeakel, 27 Pa. St. 26.
Penfold v. Ins. Co., 85 N. Y. 317.

Thus, the word "owner" in a policy of insurance means one having an insurable interest, which may be less than the absolute ownership, while the same word in a covenant to convey land implies that the covenantor has the absolute title.

Rockford Ins. Co. v. Nelson, 65 Ill. 415.

So, the word "until," "from," or the like, may have an exclusive or an inclusive meaning, according to the subject to which it is applied and the connection in which it is used.

Webster v. French, 12 Ill. 302, 304.
Higgins v. Halligan, 46 Ill. 173, 178.

2. Hadden v. Shoutz, 15 Ill. 581, 582.
Thomas v. Wiggers, 41 Ill. 470.
Kuecken v. Voltz, 110 Ill. 264.
Wilson v. Roots, 119 Ill. 379.
Wood v. Clark, 121 Ill. 359.
Reed v. Ins. Co., 95 U. S. 23, 30.
Mobile &c. Ry. Co. v. Jurey, 111 U. S. 584.
Lacy v. Green, 84 Pa. St. 514.

Courts in construing contracts, look to the language, the subject-matter, and the circumstances, and avail themselves of the light the parties had when the contract was made, in order that they may view the circumstances as the parties viewed them, and so judge of the meaning of the words and their application to the things described.

Nash v. Towne, 5 Wal. 689.

However broad may be the words of a contract, it does not extend to those things concerning which it appears that the parties did not intend to contract.

Frisby v. Ballance, 4 Scam. 287, 300.
Robinson v. Stow, 39 Ill. 568, 572.
Hoffman v. Ins. Co. 32 N. Y. 405, 412.
Gage v. Tirrell, 9 Allen, 299, 306.

Where general words follow others of more particular meaning, they are to be construed as applicable to matters or things *eiusdem generis* with those before mentioned.

Ellery v. Ins. Co., 8 Pick. 14.
Phillips v. Barber, 5 B. & Ald. 161.
Vaughan v. Porter, 16 Vt. 266.

Thus, a policy of insurance against specified perils of the sea and "all other perils and losses that should come to the said goods, ship, etc.," was construed to cover other cases of marine damage of a like kind with those specially enumerated.

Cullen v. Butler, 5 M. & S. 461.
See also Thames &c. Ins. Co. v. Hamilton, 12 App. Cas. 484.

Several instruments relating to the same subject matter, between the same parties, and made as parts of substantially one transaction, are to be taken and construed together as forming one contract.

Duncan v. Charles, 4 Scam. 561, 566.
Stacey v. Randall, 17 Ill. 467, 468.
Greenebaum v. Gage, 61 Ill. 46.
Gardt v. Brown, 113 Ill. 475.
Freer v. Lake, 115 Ill. 662.
Wilson v. Roots, 119 Ill. 379.
Jackson v. McKenny, 3 Wend. 233, 234.
Knowles v. Toone, 96 N. Y. 534, 536.
Holbrook v. Finney, 4 Mass. 566, 569.

Hunt v. Livermore, 5 Pick. 395.
Bailey v. R. R. Co., 17 Wal. 108.

For example, a mortgage deed and a separate defeasance.

Stacey v. Randall, *supra.*

Where a contract is partly written and partly printed, and these parts are inconsistent, the written part controls the printed.

American Ex. Co. v. Pinckney, 29 Ill. 392, 410.
Clark v. Woodruff, 83 N. Y. 518, 523.
People v. Dulaney, 96 Ill. 503.
Chadsey v. Guion, 97 N. Y. 333.

The language of printed blanks prepared for general use is readily assumed to be appropriate in the particular instance without careful examination, and hence it is not so likely to express the real intention of the parties as the written words specially selected by themselves for the particular transaction.

Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected.

Hibbard v. McKindley, 28 Ill. 240, 254.
Stockton v. Turner, 7 J. J. Marsh. 192.
Iredell v. Barbee, 9 Ire. 250, 254.
Buck v. Burk, 18 N. Y. 337, 339.
Dallman v. King, 4 Bing. (N. C.) 105.

As where the condition of a bond for the payment of money is, that the bond shall be void if the money be *not* paid.

Wells v. Tregusan, 2 Salk. 463.

A contract is to be sō construed, if possible, as to make it lawful,[1] reasonable,[2] and operative.[3]

1. Crittenden v. French, 21 Ill. 598.
Archibald v. Thomas, 3 Cow. 284.
Lorillard v. Clyde, 86 N. Y. 384.
Hobbs v. McLean, 117 U. S. 567.
United States v. R. R. Co., 118 U. S. 235.

If a contract is susceptible of two constructions, one of which would make it legal and the other illegal, preference will be given to the former, for it will not be presumed that the parties intended to violate the law.

2. Gale v. Dean, 20 Ill. 320, 323.
Crabtree v. Hagenbaugh, 25 Ill. 233.
Wilson v. Marlow, 66 Ill. 385.
Atwood v. Emery, 1 C. B. (N. S.) 110.
Bickford v. Cooper, 41 Pa. St. 142.
Royalton v. Turnpike Co., 14 Vt. 311.
Russell v. Allerton, 108 N. Y. 288.

A contract will never be so construed as to give one of the parties an unfair or an unreasonable advantage over the other, unless such was their manifest intention at the time it was made.

3. Bland v. People, 3 Scam. 364, 366.
Doyle v. Teas, 4 Scam. 202.
Peckham v. Haddock, 36 Ill. 38.
Field v. Leiter, 118 Ill. 17.
Atwood v. Cobb, 16 Pick. 229.
Saunders v. Clark, 29 Cal. 299.

Between different meanings that is to prevail which tends to support the contract rather than one

which would render it inoperative, for the parties must be supposed to have intended something by their agreement.

Where there is doubt as to the proper meaning of a contract, the construction which the parties, by their acts under it, have practically given it, is entitled to great weight.

Chicago v. Sheldon, 9 Wal. 50, 54.
Topliff v. Topliff, 122 U. S. 121.
Leavers v. Cleary, 75 Ill. 349.
Garrison v. Nute, 87 Ill. 215.
Vermont St. Church v. Brose, 104 Ill. 206.
Alexander v. Tolleston Club. 110 Ill. 65.
People v. Murphy, 119 Ill. 159.
Camden &c. Co. v. Lippincott, 45 N. J. L. 418.

Acts done by the parties in the performance of their agreement show how they understood it, and afford valuable aid in ascertaining its meaning.

But where the meaning of a contract is clear, an erroneous construction of it by the parties will not control its effect.

R. R. Co. v. Trimble, 10 Wal. 367.

The language of a contract in a case of doubt not otherwise removed[1], is to be taken most strongly against the party using it,[2] except where this would cause a penalty or forfeiture.[3]

1. This rule is to be resorted to only when all others fail and where the language is capable of two equally probable constructions.

Adams v. Warner, 23 Vt. 411.
Falley v. Giles, 29 Ind. 114.

2. Noonan v. Bradley, 9 Wal. 394.
Barney v. Newcomb, 9 Cush. 46.
Deblois v. Earle, 7 R. I. 26.
Richardson v. People, 85 Ill. 495.

An exception or reservation in a deed is to be construed strictly against the grantor.

Cocheco Man. Co. v. Whittier, 10 N. H. 305, 311.
Jackson v. Gardner, 8 Johns, 394.
Duryea v. Mayor, 62 N. Y. 592.
U. S. Mortgage Co. v. Gross, 93 Ill. 483.

The rule is applicable according to its purport only to such words as can be attributed to the one party and not to words that are the common language of both parties.

Beckwith v. Howard, 6 R. I. 1.

Ambiguous words and clauses in a deed of conveyance, promissory note, policy of insurance, or the like, are construed most strongly against the grantor (a), maker (b), or insurer (c), because such party is presumed to have chosen the words.

(a) Alton v. Transportation Co., 12 Ill. 38, 58.
Sharp v. Thompson, 100 Ill. 447.
Waterman v. Andrews, 14 R. I. 589.

(b) Walker v. Kimball, 22 Ill. 537, 539.
Massie v. Belford, 68 Ill. 290.

(c) Commercial Ins. Co. v. Robinson, 64 Ill. 265, 268.
Reynolds v. Ins. Co., 47 N. Y. 597.
Ins. Co. v. Slaughter, 12 Wal. 404.

The true principle of sound ethics is to give the language of the promisor the sense in which he

had reason to suppose it was understood by the promisee.

Hoffman v. Ins. Co., 32 N. Y. 405.
McCarty v. Howell, 24 Ill. 343.
Wells v. Carpenter, 65 Ill. 450.
County v. Ramsey, 20 Ill. App. 577.
Smith v. Hughes, L. R. 6 Q. B. 610.

But a legislative grant is construed most strongly against the grantee because in such case it is presumed that the grant was procured at his instance and that the language emanated from him.

Priestley v. Foulds, 2 Man. & G. 194.
Canal Co. v. Wheeley, 2 B. & Ad. 792.
R. R. Co. v. Reid, 64 N. C. 158.
Allegheny v. R. R. Co. 26 Pa. St. 360.
Dugan v. Bridge Co. 27 Pa. St. 309.
Hartford Bridge Co. v. Ferry Co. 29 Conn. 222.
Charles River Bridge v. Warren Bridge, 11 Pet. 544.
Rice v. R. R. Co. 1 Black, 380.
Mills v. County, 2 Gilm. 197, 227.
N. W. Fertilizing Co. v. Hyde Park, 70 Ill. 634.
Mayor, etc. v. R. R. Co. 97 N. Y. 281.

This, however, does not fully apply to the case where a grant is made upon adequate valuable consideration and the subject consists of mere rights of property not related to a public use, or affecting limitations upon the prerogative of the government.

See Langdon v. Mayor, etc., 93 N. Y. 145.
Dermott v. State, 99 N. Y. 107.
Garrison v. United States, 7 Wal. 688.

3. The condition of a bond is construed favorably for the obligor.

Butler v. Wigge, 1 Wms. Saund. 66.
C. B. & Q. R. R. Co. v. Aurora, 99 Ill. 214.
Bennehan v. Webb, 6 Ire. 57.

THE DISCHARGE OF CONTRACT.

The various modes of terminating a contractual obligation will be considered under the general head, Discharge of Contract.

A contract may be discharged:

By valid agreement to that effect;

In accordance with provisions for its discharge;

By performance of the contract;

By impossibility of performance in certain cases;

By the operation of rules of law upon certain sets of circumstances;

Against the injured party at his option, by breach of the contract in certain ways;

By discharge of the right of action arising from breach of the contract.

CHAPTER VIII.

DISCHARGE OF CONTRACT BY AGREEMENT.

A contract not performed on either side[1] may be discharged by an agreement of the parties that it shall no longer bind either of them.[2]

1. A mere agreement to rescind a contract which has been performed on one side would be without consideration.

Kidder v. Kidder, 33 Pa. St. 268, 269.
Crawford v. Millspaugh, 13 Johns. 87.

But the liability upon a negotiable instrument may be discharged by the destruction or surrender of the instrument with intent to discharge the liability.

Paxton v. Wood, 77 N. C. 11, 13.
Vanderbeck v. Vanderbeck, 30 N. J. Eq. 265.
Larkin v. Hardenbrook, 90 N. Y. 333.
Bragg v. Danielson, 141 Mass. p. 196.

This would be in the nature of a gift.

2. The consideration for the promise of each party is the relinquishment by the other of his rights under the contract.

Kelly v. Bliss, 54 Wis. 187, 191.

Two persons engaged to marry each other may, by a mutual agreement, rescind the engagement.

King v. Gillett, 7 M. & W. 55, 58.

The agreement may be either express or implied.

Fine v. Rogers, 15 Mo. 315.
Parmly v. Buckley, 103 Ill. 115.
Wehrli v. Rehwoldt, 107 Ill. 60.

A contract may be discharged by a change in its terms whereby a new contract is, in effect, substituted for the old one.

Bishop v. Busse, 69 Ill. 403, 406.
Farrar v. Toliver, 88 Ill. 408.
Rollins v. Marsh, 128 Mass. 116, 120.
Rogers v. Rogers, 139 Mass. 440, 444.
Teal v. Bilby, 123 U. S. 572, 578.

Where the parties to a contract change certain parts thereof they really make a new contract consisting of the new parts and what remains unchanged of the original contract. The consideration for the new right or liability is the extinguishment of the old one.

Explanation.—The intention to discharge a contract will not be presumed from a mere agreement to accept performance at a time or place other than that stipulated.

Bacon v. Cobb, 45 Ill. 47, 56.
McCombs v. McKennan, 2 W. & S. 216, 218.
Lawson v. Hogan, 93 N. Y. 39, 44.
Hickman v. Haynes, L. R. 10 C. P. 598, 603.

If the parties to a contract make a new and independent contract concerning the same

matter, and the terms of the latter are inconsistent with those of the former so that they cannot subsist together, the latter may be construed to discharge the former.

Paul v. Meservey, 58 Me. 419, 421.
Renard v. Sampson, 12 N. Y. 561, 566.
Stow v. Russell, 36 Ill. 18, 29.
Harrison v. Polar Star Lodge, 116 Ill. 279, 287.

A contract may be discharged by a release under seal or upon a sufficient consideration.[1]

Qualification.—A contract under seal[2] or required to be in writing by the Statute of Frauds[3] can be discharged by a parol or oral agreement fully performed,[4] but a contract under seal cannot be varied by a parol agreement,[5] nor can a contract required by the statute to be in writing be varied by an oral agreement.[6]

1. Benjamin v. McConnell, 4 Gilm. 536, 545.
Ill. Cent. R. R. Co. v. Read, 37 Ill. p. 511.
Bragg v. Danielson, 141 Mass. p. 196.

2. White v. Walker, 31 Ill. 422, 434.
Dearborn v. Cross, 7 Cow. 48.
Munroe v. Perkins, 9 Pick. 298.
Phelps v. Seely, 22 Gratt. 573.
Dickerson v. Board, 6 Ind. 128.
Canal Co. v. Ray, 101 U. S. 527.

3. Long v. Hartwell, 34 N. J. L. 116, 124.
Norton v. Simonds, 124 Mass. 19.

4. The actual performance and acceptance of the substituted performance operate as an accord and satisfaction.

5. Allen v. Jaquish, 21 Wend. 628, 632.
Chapman v. McGrew, 20 Ill. 101, 104.
Hume Bros. v. Taylor, 63 Ill. 43, 45.
Barnett v. Barnes, 73 Ill. 216, 217.
Loach v. Farnum, 90 Ill. 368, 369.

6. Goss v. Lord Nugent, 5 B. & Ad. 58.
Swain v. Seamens, 9 Wal. p. 271.
Hill v. Blake, 97 N. Y. 216.

A contract may be discharged by a change in the parties thereto, whereby a new party is substituted for a previous one by agreement of all three, while the terms remain the same.

This is commonly called novation. If A owes B $100, and B owes C $100, and it is agreed by the three that A shall pay C the $100, B's debt is extinguished, and C may recover that sum against A.

Heaton v. Angier, 7 N. H. 397.
McKinney v. Alvis, 14 Ill. p. 34.
Mulcrone v. Lumber Co., 55 Mich. 622.

The consideration for A's promise to pay C is the relinquishment by B of his claim against A. The rights and liabilities of B are extinguished. The consideration for B's release of A is C's release of B, and for C's release of B is A's promise to pay C.

All three must agree to the substitution.

McKinney v. Alvis, 14 Ill. 33.
Reid v. Degener, 82 Ill. 508.
Lynch v. Austin, 51 Wis. 287.

It requires the consent of the parties to the old contract to rescind the old one, and of the parties to the new contract to create the new one.

CHAPTER IX.

PROVISIONS FOR DISCHARGE.

A contract may contain a provision for its determination under certain circumstances. Such provision may be

1. That the non-fulfilment of a specified term of the contract shall give to one of the parties the option of treating the contract as discharged.

> As where the buyer of a horse stipulates that he may return it within a certain time if the horse does not answer to its description.
>
> Head v. Tattersall, L. R. 7 Ex. 7.
> See also Ray v. Thompson, 12 Cush. 281.

2. That the fulfilment of a condition[1] or the occurrence of an event[2] shall discharge the parties from further liabilities under the contract.

> 1. As in the case of a bond defeasible upon a condition expressed therein commonly called a condition subsequent.

2. The occurrence of one of the "excepted risks" of a charter party whereby the voyage becomes impossible, discharges the ship-owner.

Geipel v. Smith, L. R. 7 Q. B. 404.

3. That the contract may be terminated at the option of one of the parties upon certain terms.

As where a contract of employment for a definite time provides that either party may terminate it within the time by giving a specified notice.

CHAPTER X.

DISCHARGE OF CONTRACT BY PERFORMANCE.

A contract may be discharged by performance in accordance with the terms thereof.

Where a promise is given upon an executed consideration, the contract is unilateral, and the performance of the promise discharges the contract. Where one promise is given in consideration of another, though performance by one party discharges him from further liabilities under the contract it does not release the other. In order that performance may operate as a discharge of both, each must have performed his part of the contract.

A modification of the performance of a contract may be offered and accepted in satisfaction of the performance stipulated for, and be equally effectual in satisfaction and discharge of the contract.

As where under a contract for the sale and delivery of goods, a different mode of delivery is substituted by the seller with the assent of the buyer.

Leather Cloth Co. v. Hieronimus, L. R. 10 Q. B. 140.
See also Long v. Hartwell, 34 N. J. L. 116.

Performance of a contract for the delivery of money only is called payment.

Where a negotiable instrument is taken in lieu of payment, the presumption is that the parties intended it to be a conditional discharge.

The Kimball, 3 Wal. 37, 45.
Jaffrey v. Cornish, 10 N. H. 505.
Heartt v. Rhodes, 66 Ill. 351.
Walsh v. Lennon, 98 Ill. 27.
Jagger Iron Co. v. Walker, 76 N. Y. 521, 524.

Upon dishonor of the note or bill, the creditor, if not guilty of laches in respect thereto (a), may resort to the original cause of action and recover thereon upon surrendering or satisfactorily accounting for the note or bill at the trial (b).

(a) Dayton v. Trull, 23 Wend. 345.
Phoenix Ins. Co. v. Allen, 11 Mich. 501.
Stevens v. Park, 73 Ill. 387.

(b) Hays v. McClurg, 4 Watts, 452.
Miller v. Lumsden, 16 Ill. 161.
Morrison v. Smith, 81 Ill. 221.

The rule is based on the obvious ground that a mere promise to pay ought not to be treated as an absolute payment unless there is an agreement to accept it as such.

The rule applies whether the debtor gives his own note or bill or that of a third person, and whether it is given for a precedent (a) or a contemporaneous (b) debt, with the following exception.

(a) Tobey v. Barber, 5 Johns. 68, 72.
McConnell v. Stettinius, 2 Gilm. 707.
Peter v. Beverly, 10 Pet. 532.
Downey v. Hicks, 14 How. 249.
Wilhelm v. Schmidt, 84 Ill. 183.
Stone and Gravel Co. v. Iron Works, 124 Ill. 623.
Jansen v. Grimshaw, 125 Ill. 468.

(b) Whitney v. Goin, 20 N. H. 354.
Monroe v. Hoff, 5 Denio, 360.

Exception.—The rule does not apply where the negotiable instrument of a third person is given without guaranty or indorsement or is indorsed without recourse for a debt contracted at the time.

Whitbeck v. VanNess, 11 Johns, p. 414.
Breed v. Cook, 15 Johns. 241.
Noel v. Murray, 13 N. Y. 167.

As where a note of a third person is transferred by mere delivery or is indorsed without recourse for the price of goods sold at the time. Such a transaction is considered a barter or exchange of the note for the goods.

Where a promisor has made a proper offer of performance to the promisee and the offer has not been accepted, the promisor is thereby discharged from liability on his promise.[1]

Exception.—Where the performance due consists in the payment of money a tender by the debtor does not of itself constitute a discharge of the debt.[2]

1. Startup v. Macdonald, 6 M. & G. 593.
Lamb v. Lathrop, 13 Wend. 95.

2. In order that the debtor may avail himself of a tender as a defense he must, from the time of making it, continue ready and willing to pay the debt, and if sued upon it must pay the money into court. The tender thus kept good puts a stop to accruing damages or interest for delay in payment, and if the debtor is sued, entitles him to judgment for his costs.

Aulger v. Clay, 109 Ill. 487, 492.
Bissell v. Heyward, 96 U. S. 580.

The object of payment into court is to place the money tendered where the plaintiff will be sure to get it. It then becomes the plaintiff's money and the defendant cannot dispute his right to it.

Becker v. Boon, 61 N. Y. 322.

CHAPTER XI.

IMPOSSIBILITY OF PERFORMANCE.

As a general rule where there is a positive contract to do a thing possible in its nature and by law, the promisor must do it or pay damages for not doing it, although in consequence of some unforeseen cause over which he had no control the performance of his contract has become impossible.

The Harriman, 9 Wal. 161, 172.
Jones v. United States, 96 U. S. 24, 29.
Bacon v. Cobb, 45 Ill. 47, 52.
Booth v. Mill Co., 60 N. Y. 487, 491.
Harrison v. Ry. Co., 74 Mo. 364, 371.

Thus, where a party had agreed to transport goods from New York to Independence, Mo., within twenty-six days, and failed to accomplish it in that time, it was held that the fact that a public canal on which the goods were intended to be transported a part of the distance was rendered impassable by an unusual freshet, and that this occasioned the detention, was not a legal excuse therefor.

Harmony v. Bingham, 12 N. Y. 99.

But where the cause of the subsequent impossibility of performance is of such a character that it

cannot reasonably be supposed to have been in the contemplation of the promisor when the contract was made, he will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.

Baily v. De Crespigny, L. R. 4 Q. B. 185.

In such case it will be presumed that according to the true intention of the parties the contract was conditional on its performance continuing possible in fact and in law.

In the following cases an undertaking in general terms to do a thing will not be construed to be absolute and unconditional whereby the promisor would be held bound to make compensation in damages for its non-performance:

1. Where a specific thing whose continued existence is essential to the performance is destroyed without default of the promisor.

Dexter v. Norton, 47 N, Y. 62, 64.
Wells v. Calnan, 107 Mass. 514, 515.
Walker v. Tucker, 70 Ill. 527, 542.
The Tornado, 108 U. S. 342, 351.
Ward v. Vance, 93 Pa. St. 499.

Thus, where a music hall was let for a concert on a future day, and before the day arrived it was accidentally destroyed by fire, the lessor was discharged from liability because from the nature of

the contract it was apparent that the parties contemplated the continuing existence of the hall as the foundation of the undertaking.

Taylor v. Caldwell, 3 B. & S. 826.

2. Where the undertaking is for the personal services of the promisor, and the performance becomes impossible by reason of his death, insanity, or incapacitating sickness.

Boast v. Firth, L. R. 4 C. P. 1, 7.
Spalding v. Rosa, 71 N. Y. 40, 44.
Siler v. Gray, 86 N. C. 566.
Martin v. Hunt, 1 Allen, p. 419.

Thus, the contract of an eminent pianist to perform at a concert on an appointed day was construed to be conditional upon her health permitting her to do so. The principle applies wherever there is a contract to perform a service which no deputy or legal representative could perform.

Robinson v. Davison, L. R. 6 Ex. 269.

3. Where the performance becomes impossible by law. As by reason of a change in the law or some action by or under the authority of the government.

Jones v. Judd, 4 N. Y. 411.
People v. Ins. Co., 91 N. Y. 174.
Buffalo &c. R. R. Co. v. R. R. Co., 111 N. Y. 132.
Semmes v. Ins. Co., 13 Wal. 158.

Thus, where a party leased a tract of land with a covenant that only ornamental buildings should be

erected on an adjacent tract retained by him, and the tract retained was subsequently taken and used for a station by a railroad company under powers given to it by the legislature, it was held that the lessor was discharged from his covenant.

Baily v. De Crespigny, L. R. 4 Q. B. 180.

So it was held that a covenant in the lease of a wooden building to rebuild the same in case of fire, was released by the subsequent passage of a municipal ordinance prohibiting the erection of wooden buildings in that locality.

Cordes v. Miller, 39 Mich. 581.

If a party has an option to perform his contract in either of two modes, and one of the modes becomes impossible, he is bound to perform it in the other mode.

State v. Worthington, 7 Ohio, 171.
Jacquinet v. Boutron, 19 La. Ann. 30.

Thus, a creditor who in his receipt for a safe taken by him as collateral security, promised on payment of the debt to deliver the safe to the debtor or its equivalent in money, was held liable for the value thereof where, without fault on his part, it was destroyed by fire while in his possession.

Drake v. White, 117 Mass. 10.

CHAPTER XII.

DISCHARGE OF CONTRACT BY OPERATION OF LAW.

Discharge of a contract by operation of law and without reference to the intention of the parties may occur

By Merger;

By Alteration of a Written Instrument;

By Bankruptcy.

MERGER.

Where a new security of a higher nature in legal operation than an old one is taken by the same person against the same person for the same debt or demand, the old security is merged in and extinguished by the new one.

Price v. Moulton, 10 C. B. 561, 573.
Jones v. Johnson, 3 W. & S. 276, 277.

As where the parties to a simple contract enter into one on the same matter under seal, the latter being of higher efficacy than the former.

Banorgee v. Hovey, 5 Mass. p. 40.
Wann v. McNulty, 2 Gilm. p. 358.

ALTERATION OF A WRITTEN INSTRUMENT.

The intentional alteration[1] of a written contract in a material part[2] by or with the assent of one of the parties thereto[3] without the consent of the other,[4] discharges all the executory obligations[5] in favor of the former[6] against the latter.[7]

Angle v. Ins. Co., 92 U. S. 330.
Smith v. United States, 2 Wal. 219, 232.
Gardiner v. Harback, 21 Ill. p. 130.
Meyer v. Huneke, 55 N. Y. 412.

As where the alteration of a promissory note would give or increase interest.

Neff v. Horner, 63 Pa. St. 327.
Fay v. Smith, 1 Allen, 477.
McGrath v. Clark, 56 N. Y. 34.
Thompson v. Massie, 41 Ohio St. 307.
Benedict v. Miner, 58 Ill. 19.

The ground of the rule is public policy for the protection of legal instruments from fraud and substitution. The purpose is to keep interested parties from tampering with them by the risk of forfeiting them in case of detection.

1. An accidental alteration does not prejudice the promisee.

Neff v. Horner, 63 Pa. St. p. 330.
Bledsoe v. Graves, 4 Scam. p. 384.

2. The promisor is discharged from his liability by any alteration that would give the contract a

different operation, whether the alteration be or be not to his prejudice.

Gardner v. Walsh, 5 E. & B. 83, 89.
Coburn v. Webb, 56 Ind. 96, 100.
Wyman v. Yeomans, 84 Ill. 403, 405.
Martin v. Thomas, 24 How. 315, 317.

As where the time for payment of a promissory note is thereby either hastened or delayed.

Wood v. Steele, 6 Wal. 80, 82.
Davis v. Jenney, 1 Met. 221.
Vance v. Lowther, 1 Ex. D. 176.
Crawford v. West Side Bank, 100 N. Y. 50.

An alteration which only expresses what the law would otherwise imply is not a material alteration.

Hunt v. Adams, 6 Mass. 519, 522.
Brown v. Pinkham, 18 Pick. 172, 174.
Kelly v. Trumble, 74 Ill. 428, 429.
Rudesill v. Jefferson County, 85 Ill. 446, 448.

As where the words "on demand" are inserted in a promissory note expressing no time for payment.

Aldous v. Cornwell, L. R. 3 Q. B. 573.

3. An alteration by a stranger does not affect the contract.

Rees v. Overbaugh, 6 Cow. 746, 748.
Condict v. Flower, 106 Ill. 105, 114.
Bigelow v. Stilphen, 35 Vt. 521.
Hunt v. Gray, 35 N. J. L. 227.
Drum v. Drum, 133 Mass. p. 568.

4. An alteration with the consent of the other party would amount to a new contract.

Stiles v. Probst, 69 Ill. 382, 387.
Speake v. United States, 9 Cranch, 28, 37.
Smith v. Weld, 2 Pa. St. p. 55.
Tompkins v. Corwin, 9 Cow. 255.

5. An alteration in a deed of conveyance does not divest the estate vested by the deed, although it may avoid the covenants therein.

Chessman v. Whittemore, 23 Pick. 231, 233.
Kendall v. Kendall, 12 Allen, 92, 93.
Herrick v. Malin, 22 Wend, 388, 393.
Arrison v. Harmstead, 2 Pa. St. 191, 194.

6. The obligations in favor of a party not consenting to the alteration remain unaffected, provided the nature and extent of the alteration can be clearly ascertained, and it can be seen what the contract was at the time it was executed.

Bledsoe v. Graves, 4 Scam. 382, 384.
Martin v. Ins. Co. 101 N. Y. 498, 503.
Drum v. Drum, 133 Mass. 566, 568,

7. Where there are several promisors those consenting to the alteration are bound thereby, while the rest are discharged.

Gardiner v. Harback, 21 Ill. 129.
Prettyman v. Goodrich, 23 Ill. 330.
Canon v. Grigsby, 116 Ill. 151.
Warring v. Williams, 8 Pick. 322.
State v. Van Pelt, 1 Ind. 304.
Myers v. Nell, 84 Pa. St. 369.
Davis v. Bauer, 41 Ohio St. 257.

BANKRUPTCY.

Where there is a bankrupt law a discharge in bankruptcy duly granted, will, subject to the limitations, if any, imposed by the law, release the bankrupt from all debts and liabilities provable against his estate in bankruptcy.

CHAPTER XIII.

DISCHARGE OF CONTRACT BY BREACH.

Upon every breach of a contract the injured party acquires a right of action for compensation, but it is not every breach by one of the parties that will discharge the other from performance of his part of the contract. For the promise of one party may be absolute and independent of that of the other, or the breach may be in a matter not considered by the parties as essential to the continuance of the contract.

If one of the parties to a contract breaks it in one of the following ways, the other party may avail himself of the breach as a discharge from the further performance on his part, and thereupon bring an action for compensation in damages.

1. Breach by renunciation of the contract.

(1) The renunciation may be made before performance of the contract is due.

When one of the parties, before the time of performance arrives, repudiates the contract and

declares he will no longer be bound by it, it is quite right to hold that the other party, if so minded, may act on the declaration and treat the contract as broken and bring an action immediately, without waiting for the time of performance.

Hochster v. De la Tour, 2 E. & B. 678.
Frost v. Knight, L. R. 7 Ex. 111, 114.
Fox v. Kitton, 19 Ill. 519, 533.
Chamber of Commerce, v. Sollitt, 43 Ill. 519, 523.
Follansbee v. Adams, 86 Ill. 13, 14.
Grau v. McVicker, 8 Biss. 13, 17.
Howard v. Daly, 61 N. Y. 362, 374.
Ferris v. Spooner, 102 N. Y. 10.

It was so held where a person contracted to employ another as courier from a future day for three months and before the day gave him notice that he had changed his mind and should not give the employment.

Hochster v. De la Tour, *supra.*

So, also, where a man was engaged to marry a woman upon the death of his father, and whilst the father was living broke off the engagement.

Frost v. Knight, *supra.*
Burtis v. Thompson, 42 N. Y. 246.
Holloway v. Griffith, 32 Iowa, 409.

The rule has no application to unilateral contracts such as promissory notes.

See Burtis v. Thompson, 42 N. Y. p. 250.

It is not applicable to cases where the repudiation is only partial, as in the case of a lease containing several covenants where there is a refusal to comply with a particular covenant not going to the whole consideration.

See Johnstone v. Milling, 16 Q. B. 460, 468.
Willson v. Phillips, 2 Bing. 13.
Obermyer v. Nichols, 6 Binn. 159.

Expressions which do not amount to an absolute and unequivocal refusal to perform the contract cannot be treated as a renunciation.

Dingley v. Oler, 117 U. S. 490, 502.
Johnstone v. Milling, 16 Q. B. D. 460.

The promisee is not bound to take a renunciation by the promisor as a breach of the contract (a). He may treat it as inoperative, but in that case he keeps the contract open for the benefit of the promisor as well as his own, and thereby enables the promisor not only to complete the contract, if so disposed, but also to take advantage of any supervening circumstance that would justify him in declining to complete it (b).

(a) Kadish v. Young, 108 Ill. 170, 177.
Zuck v. McClure, 98 Pa. St. 541, 545.

(b) Frost v. Knight, L. R. 7 Ex. p. 112.
Kadish v. Young, 108 Ill. p. 181.
Howard v. Daly, 61 N. Y. p. 375.

Thus, where the charterer of a ship gave notice to the shipowner that he should be unable to provide a cargo, and requested him to leave the port, but the shipowner declined to do so and insisted upon having a cargo in fulfilment of the charter party; and whilst the days allowed for loading were still unexpired, a declaration of war put an end to the charter party, it was held that the charterer was discharged.

Avery v. Bowden, 5 E. & B. 714.

(2) The renunciation may be made in the course of performance of the contract.

The promisee may treat the renunciation as a discharge from further performance on his part, and thereupon bring an action, although such performance would otherwise be a condition precedent to the liability of the promisor.

Cort v. Ry. Co., 17 Q. B. 127, 148.
Hosmer v. Wilson, 7 Mich. 294, 304.
McCormick v. Basal, 46 Iowa, 235, 236.
James v. Adams, 16 W. Va. 245, 266.
Dugan v. Anderson, 36 Md. 567, 584.
Parker v. Russell, 133 Mass. 74, 76.

Thus, where a contract was made for the manufacture and supply of goods of a specified kind, to be delivered in certain quantities monthly, and the buyer after accepting a portion of the goods gave notice to the seller that he had no occasion for more and would not accept or pay for them, it was held that the seller might claim for breach of contract without manufacturing or tendering the rest of the goods.

Cort v. Ry. Co., *supra.*

2. Breach by an act that renders the contract impossible of performance.

(1) The disabling act may be done before the performance of the contract is due.

When one of the parties, before the time for performance arrives, makes it impossible that he should perform his promise, the other party may treat the contract as broken and bring an action immediately.

Ford v. Tiley, 6 B. & C. 325.
Short v. Stone, 8 Q. B. 358.
Lee v. Pennington, 7 Ill. App. 247, 251.
Wolf v. Marsh, 54 Cal. 228, 232.
Hawley v. Keeler, 53 N. Y. 114.
Newcomb v. Brackett, 16 Mass. 161.
Heard v. Bowers, 23 Pick. p. 460.

It was so held where A contracted with B to execute a lease to him on a future day for a certain term and before the day executed a lease to C for the same term.

Ford v. Tiley, *supra.*
Lovelock v. Franklyn, 8 Q. B. 371.

So, also, where a man promised to marry a woman on a future day and before the day married another woman.

Short v. Stone, *supra.*
Sheahan v. Barry, 27 Mich. 217.
King v. Kersey, 2 Ind. 402.

(2) The disabling act may be done in the course of performance of the contract.

The other party may treat such act as a discharge from further performance, and claim compensation for the part he has performed or the damages he has sustained.

Planche v. Colburn, 8 Bing. 14, 16.
Chicago v. Tilley, 103 U. S. 146, 154.
Lovell v. Ins. Co., 111 U. S. 264, 274.
Shaffner v. Killian, 7 Ill. App. 620, 622.
Moulton v. Trask, 9 Met. 577, 580.
Derby v. Johnson, 21 Vt. 17.

Thus, where a publisher engaged an author to write a treatise for a periodical, and before comple-

tion of the treatise abandoned the publication of the periodical, it was held that the author was not bound to complete the treatise, and was entitled to claim remuneration for the part already written.

Planche v. Colburn, *supra.*

3. Breach by a failure of performance where the performance is a condition concurrent with[1] or precedent to[2] the performance of the other party.[3]

1. In ordinary contracts for the sale of goods the obligation of the seller to deliver and that of the buyer to pay are concurrent conditions in the nature of mutual conditions precedent, and neither can enforce the contract against the other without showing performance or readiness and willingness to perform his own promise.

Morton v. Lamb, 7 T. R. 121, 125.
Bank v. Hagner, 1 Pet. 455, 465.
Hough v. Rawson, 17 Ill. 588.
Metz v. Albrecht, 52 Ill. 491.
Smith v. Lewis, 26 Conn. 110.
Clark v. Weis, 87 Ill. 438.

2. In ordinary contracts for service the performance of the service is a condition precedent, and the employee is not entitled to payment without rendering or offering to render the agreed service.

McMillan v. Vanderlip, 12 Johns. 165.
Stark v. Parker, 2 Pick. 267.
Olmstead v. Beale, 19 Pick. 528.
Eldridge v. Rowe, 2 Gilm. 91.
Badgeley v. Heald, 4 Gilm. 64.
Hansell v. Erickson, 28 Ill. 257.

3. Where the stipulations are entirely independent, or where the contract is severable, there may in some cases be a suit without performance or full performance by the plaintiff. And the parties may include in one instrument matters so distinct, or make their intention so plain that the court must adopt that construction. But where the thing to be done on one side is the consideration for the thing to be done on the other, the court will lean toward considering them as dependent or conditional, *i. e.*, one cannot sue the other without showing performance, or an offer of performance on his part. And this especially in the case where money is to be paid for something done or delivered, when it could not be supposed that the intention of the parties was that the money was to be paid without performance on the other side.

King Philip Mills v. Slater, 12 R. I. 88.

The question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way.

Stavers v. Curling, 3 Bing. (N. C.) 355.
Philadelphia &c. R. R. Co. v. Howard, 13 How. 339.
Lowber v. Bangs, 2 Wal. 736, 745.

4. Breach by a failure of performance in a matter considered by the parties essential to the continuance of the contract.

If the failure is in a matter which the parties to the contract have expressly stated shall be vital to its existence (a), or which upon a reasonable construction of the contract they may be deemed to have considered as vital, it will release the promisee from a performance on his part (b).

(a) As where the time of performing a contract is expressly stated to be of the essence of the contract.

Chrisman v. Miller, 21 Ill. 227, 235.
Wynkoop v. Cowing, 21 Ill. 570, 585.
Taylor v. Longworth, 14 Pet. 172, 174.
Grigg v. Landis, 21 N. J. Eq. 494, 503.
Hicks v. Aylsworth, 13 R. I. 562, 566.

(b) If the subject-matter of a contract for sale be of greater or less value according to the efflux of time, time is of the essence of the contract.

Wilson v. Roots, 119 Ill. 379, 392.
Goldsmith v. Guild, 10 Allen, 239, 241.
Carter v. Phillips, 144 Mass. 100, 103.

It was so held where the manifest purpose and object of the contract was to procure at a specified time and place necessary supplies of clothing for an army in the field.

Jones v. United States, 96 U. S. 24, 27.

In a mercantile contract, a statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.

Norrington v. Wright, 115 U. S. 188.
Cleveland Rolling Mill Co. v. Rhodes, 121 U. S. 255.
Pope v. Porter, 102 N. Y. 366.
Rommel v. Wingate, 103 Mass. 327.

But where one of the parties to a contract is bound to do certain work within a certain time, and fails to complete it within the stipulated time, and the other party urges him to go on, this is a waiver of strict performance as to time, and a recovery may be had on the basis of the amount and value of the work done, reckoned at the contract price, deducting damages for the delay.

Phillips &c. Co. v. Seymour, 91 U. S. 646, 650.

A matter is always treated as vital, when it goes to the root of the contract, so that a failure therein would frustrate the main object of the contract.

Thus, where a singer was engaged for a season to take the principal part in a new opera, it was held that her failure to perform on the opening and the three next succeeding nights, went to the root of the contract and discharged the other party.

Poussard v. Spiers, 1 Q. B. D. 410.
See also Spalding v. Rosa, 71 N. Y. 40.

And, in general, where the failure to perform a contract is in respect to matters which would render the performance of the residue a thing different in substance from what was contracted for, the party not in default may abandon the contract.

Leopold v. Salkey, 89 Ill. 412, 422.

But where, in a contract for the exclusive services of a singer for a season, one of the stipulations was

that he should "be in London without fail at least six days before the commencement of his engagement for the purpose of rehearsals," and he arrived there only two days before the appointed time, the court, upon looking at the whole contract, was of opinion that this stipulation did not go to the root of the contract so that a failure to perform it would render the performance of the rest of the contract a thing different in substance from what was contracted for. It was accordingly held that the breach of the stipulation did not authorize the other party to abandon the contract, but merely partially affected it, and might be compensated for in damages.

Bettini v. Gye, 1 Q. B. D. 183.
See also Weintz v. Hafner, 78 Ill. 27.

And where the substantial part of the consideration, embracing several stipulations or acts, has been received by the defendant and the non-performance of one of them does not materially impair the benefit from the performance of the others, and the loss occasioned by the breach may be compensated in damages, the defendant has his remedy by recoupment or by a cross action, but will not be allowed to set up the breach as a ground to defeat the plaintiff's entire claim.

For in such cases the importance of the part performed and the relation it bears to the contract as a whole are such that it cannot reasonably be supposed that the parties intended that in case of a failure in such a relatively unimportant particular the defendant should enjoy the benefit of what is done and the plaintiff have no compensation.

Boone v. Eyre, 1 H. Bl. 273, note *a*.
Nelson v. Oren, 41 Ill. 18, 23.
White v. Gillman, 43 Ill. 502.
Lunn v. Gage, 37 Ill. 19.
Stavers v. Curling, 3 Bing. (N. C.) 355.
Danville Bridge Co. v. Pomroy, 15 Pa. St. 151, 159.
Leonard v. Dyer, 26 Conn. 172.
Nolan v. Whitney, 88 N. Y. 648.
Kane v. Stone Co., 39 Ohio St. 1.
Emigrant Co. v. County, 100 U. S. 70.
Ellen v. Topp, 6 Ex. p. 441.
Graves v. Legg, 9 Ex. p. 716.
Jones v. Marsh, 22 Vt. p. 148.
See also Richards v. Shaw, 67 Ill. 222.
Wilson v. Wagar, 26 Mich. 452.

CHAPTER XIV.

DISCHARGE OF RIGHT OF ACTION.

It has already been stated that upon every breach of a contract the injured party acquires a right of action for compensation.

The compensation at common law is always pecuniary damages.

In certain classes of contracts where the remedy at law would furnish an inadequate compensation, a court of equity will take jurisdiction and decree a specific performance of the contract.

But inasmuch as pecuniary damages and specific performance depend upon, and to a large extent vary with the nature of the contract which has been broken, they hardly belong to the subject of contracts in general, and can be more profitably considered in immediate connection with the particular kinds of contracts.

We shall, therefore, leave the subject of contracts in general after stating the rules that relate to the discharge of the right of action arising from breach of contract.

The right of action arising from a breach of contract may be discharged by

A release;

An accord and satisfaction;

The judgment of a court of competent jurisdiction;

Lapse of time.

RELEASE.

The release of a right of action must be under seal or for a valuable consideration operating by way of accord and satisfaction.

Ill. Cent. R. R. Co. v. Read, 37 Ill. 484, 511.
Kidder v. Kidder, 33 Pa. St. 268.
Jackson v. Stackhouse, 1 Cow. 122.
Hunt v. Brown, 146 Mass. 253, 254.

ACCORD AND SATISFACTION.

An accord and satisfaction takes place.

1. Where there is an agreement in the nature of an offer to accept the performance (not the promise) of something new in satisfaction of a claim, and that which is so agreed upon is actually performed before the withdrawal of the offer.

Simmons v. Clark, 56 Ill. 96, 101.
Kromer v. Heim, 75 N. Y. 574.
Pettis v. Ray, 12 R. I. 344.
Costello v. Cady, 102 Mass. 140.
Petty v. Allen, 134 Mass. 265.
Memphis v. Brown, 20 Wal. 308.

The accord without satisfaction is no bar to an action for the claim, for the accord alone is merely the agreement of the parties as to what may be given or done and accepted in satisfaction. Accordingly a mere agreement between debtor and creditor to give and take payment of the debt in goods to be delivered, constitutes no answer to an action for the debt, unless the goods have been actually delivered and accepted in satisfaction.

2. Where there is an agreement whereby it clearly appears that the promise (not the performance) of something new is taken for and in satisfaction of a claim.

Whitney v. Cook, 53 Miss. 551, 559.
Bennett v. Hill, 14 R. I. 322, 324.
Morehouse v. Bank, 98 N. Y. 503, 508.

Thus, by a clear agreement to that effect, a negotiable instrument may be given and accepted in absolute satisfaction of a debt, and not merely as a conditional payment defeasible by dishonor of the instrument.

Witherby v. Mann, 11 Johns. 518.
Strong v. King, 35 Ill. 9.
Gage v. Lewis, 68 Ill. p. 618.
Yates v. Valentine, 71 Ill. 643.

So an agreement for a composition between a debtor and his creditors may be made and accepted in satisfaction of the debts.

Good v. Cheesman, 2 B. & Ad. 328.
Boyd v. Hind, 1 H. & N. p. 947.
Kromer v. Heim, 75 N. Y. p. 577.
Baxter v. Bell, 86 N. Y. 195, 199.

JUDGMENT OF A COURT.

Where a cause of action is pursued to final[1] judgment in a court of competent jurisdiction,[2] a judgment in favor of the plaintiff discharges the cause of action by way of merger,[3] and a judgment against him on the merits[4] discharges it by way of estoppel.[5]

1. Webb v. Bucklew, 82 N. Y. 555.
Linington v. Strong, 111 Ill. 152.

2. Hickey v. Stewart, 3 How. 750, 762.
Richardson v. Aiken, 84 Ill. 221.
Mount v. Scholes, 120 Ill. 394.

3. Wayman v. Cochrane, 35 Ill. 152.
Runnamaker v. Cordray, 54 Ill. 303.
Boynton v. Ball, 105 Ill. 627.
Mason v. Eldred, 6 Wal. 231.

4. A judgment against a plaintiff because the action was prematurely brought is not a bar to a suit subsequently brought after the cause of action has accrued.

Brackett v. People, 115 Ill. 29.
McFarlane v. Cushman, 21 Wis. 401.
Bull v. Hopkins, 7 Johns. 22.
Kane v. Fisher, 2 Watts, 246.

So if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is supplied in the second suit, the judgment in the first suit is not a bar to the second.

Gould v. R. R. Co., 91 U. S. 526.
Stowell v. Chamberlain, 60 N. Y. 272.

5. Marsh v. Pier, 4 Rawle, 273, 288.
Norton v. Doherty, 3 Gray, 372.
Cromwell v. Sac, 94 U. S. 351.
Russell v. Place, 94 U. S. 606.
Campbell v. Rankin, 99 U. S. 261.
Patrick v. Shaffer, 94 N. Y. 423.
Nispel v. Laparle, 74 Ill. 306.

If the judgment be set aside (a) or reversed (b) the parties will be remitted to their former positions so far as it can be done without prejudice to the rights of third persons (c). A final judgment in the plaintiff's favor may be discharged by payment of the judgment (d) or by satisfaction obtained by process of *execution* (e).

(a) Clark v. Bowen, 22 How. 270.
(b) Chickering v. Failes, 29 Ill. 294, 303.
(c) Wadhams v. Gay, 73 Ill. 415, 422.
(d) Thompkins v. Bank, 53 Ill. 57.
Booth v. Bank, 74 N. Y. 228.
(e) Chandler v. Higgins, 109 Ill. 602.
Smith v. Hughes, 24 Ill. 270.
Harris v. Evans, 81 Ill. 419.

LAPSE OF TIME.

In the several States there are statutes called Statutes of Limitation, which prescribe a limit of time for the commencement of an action, and when invoked afford an absolute bar to an action brought beyond the prescribed time.

IN ILLINOIS.

The time prescribed for an action on a contract after the breach thereof is five years, if

the contract is not in writing, and ten years if it is in writing.[1]

The time may be extended by part payment or new promise to pay, in the case of an unwritten contract, by parol, for five years,[2] and in the case of a written contract, by writing, for ten years after the time of such payment or promise to pay.[3]

1. R. S. Ch. 83, §§ 15, 16.

2. Carroll v. Forsyth, 69 Ill. 127.

3. R. S. Ch. 83, § 16.

A defendant may plead a set-off or counter claim barred by the Statute of Limitation, while held and owned by him, to any action, the cause of which was owned by the plaintiff or person under whom he claims, before such set-off or counter claim was so barred, and not otherwise. This, however, does not affect the right of a *bona fide* assignee of a negotiable instrument assigned before due.

R. S. Ch. 83, § 17.
See Steere v. Brownell, 124 Ill. 27.

If the promisor is out of the State when the right of action accrues, or thereafter departs from and resides out of the State, the time of his absence is no part of the prescribed time.

This, however, has no application where the promisor and promisee were both non-residents at the time the right of action accrued.[1]

But an action cannot be maintained in this State on a contract when the right of action thereon has existed in another State or country long enough to be barred by the laws thereof.[2]

1. R. S. Ch. 83, § 18.

2. R. S. Ch. 83, § 20.
Osgood v. Artt, 11 Biss. 160.
Humphrey v. Cole, 14 Ill. App. 56.

If either the promisee or the promisor die within the year previous to the expiration of the prescribed time, and the cause of action survives, an action may be commenced, in the one case, by the representative of the promisee within one year from his death, and in the other case, against the representative of the promisor within one year after his appointment.

R. S. Ch. 83, § 19.

If the promisee is a minor, or insane, or imprisoned on a criminal charge, at the time the cause of action accrues, he may bring the action within two years after the disability is removed.

R. S. Ch. 83, § 21.

If a person liable to an action fraudulently conceals the cause of action from the person entitled thereto, the latter may bring an action within five years after he discovers that he has such cause of action.

R. S. Ch. 83, § 22.

This provision is more frequently invoked in cases of *quasi* contract, or "contract implied in law," where money has been obtained by wrong or paid under mistake of fact.

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